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AMERICAN COMMERCIAL LAW SERIES
VOLUME IX

PROPERTY

(REAL AND PERSONAL)

WITH

QUESTIONS, PROBLEMS AND FORMS

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THIS SERIES OF BOOKS
IS RESPECTFULLY DEDICATED TO

PROFESSOR WILLARD EUGENE HOTCHKISS

DEAN OF NORTHWESTERN UNIVERSITY
SCHOOL OF COMMERCE
WHOSE ZEAL IN THE CAUSE OF COMMERCIAL
EDUCATION HAS BEEN A CONSTANT SOURCE OF
INSPIRATION TO THE AUTHOR

PREFACE TO THIS VOLUME.

The author has endeavored herein to take up the important phases of the Law of Property, personal and real. This is a most important and an interesting subject. In a book of this size it is of course apparent that there can be no extensive inquiry into any branch of the law. An attempt has been made to state the fundamentals clearly and concisely. In this as in other volumes, the author reminds the reader that the local law may make peculiar changes and applications.

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THE LAW OF PROPERTY.

THE LAW OF PROPERTY.

PART I.

INTRODUCTORY.

CHAPTER 1.

DEFINITION AND DIVISIONS.

Sec. 1. THE TERM PROPERTY DEFINED. The term property is used in two senses; to indicate the right and interest which a person has in anything which the law makes the subject of ownership; and second, to indicate the thing in which this right and interest is held.

We speak of a person owning "property," meaning thereby to indicate that he has lands, or goods or anything which the law entitles him to possess as of his own right. But in another sense "property" has the meaning of "ownership" or "title." Thus we say that the property to certain goods is in a certain person, or, if we may permit the two uses of the word in the same sentence, we might say, that the property to certain property is in John Doe, though this of course would be awkward diction.

We shall use the term throughout this text in its more usual meaning, that of a thing or right which can be the subject of ownership. We may thus speak of land as property, or an easement which one may have in another's land, as property.

A. The Division of Property Into Real and Personal Property.

Sec. 2. REAL PROPERTY AND PERSONAL PROPERTY DEFINED. The term real property signifies that property which is of a fixed, immovable nature. The term personal property signifies property which in its present state is of a movable, temporary character.

It has been said by some text writers that the distinction between real and personal property is merely historical and not logical. But while it is to an extent merely historical there are important differences in the very nature of things between that which we call real property and that which we call personal property and this distinction is not entirely illogical. There is a real difference between that sort of property, as a pocket knife or cane, which we can carry away, conceal or destroy, and a piece of land which is fixed and permanent. And the law makes, as men in the usual dealings of life, make, important distinctions. Real property includes the ground and all that is attached thereto for its permanent improvement. Personal property is every other species of property. Thus A owns several acres of land. He puts thereon a house, a barn, fences, and a windmill. All of these things are real property. He may indeed remove them and make them personal property. But until he does so, they are a part of the real estate. If he sells the farm, describing it by metes and bounds, all of these improvements become the property of the buyer of the farm though no mention is made of them.

Property *must be either* real or personal, although we will find that from different *standpoints,* some

property which is near the border line may be regarded as either real or personal. But judged from the same standpoint (and as for most property judged from *any* standpoint) at any given moment property is either personal or real.

Property though at any time either personal or real may be at *different* times personal and real. Thus clay in its natural state is real property. Being removed and placed in wagons, it becomes personal property. Baked into bricks, it is personal property. Built into a house it becomes again real property. The house is torn down and the bricks scattered upon the ground. The property is again personal. The same may be said of a tree, cut down, made into benches and these nailed to the floor of a schoolhouse.

Real property we also call "realty" and "real estate;" personal property we call "personalty," and "personal estate."

We will now consider some practical differences in the law applicable to these two sorts of property.

Sec. 3. SOME PRACTICAL DIFFERENCES IN THE LAW BASED ON THIS CLASSIFICATION. The law which governs real property differs in many respects from that which governs personal property.

(1) *As to Descent and Distribution.* When a person dies the law names certain classes of persons who take his property if he has not named any one by last will. Those whom the law names to take his real estate are called his heirs. If he names them by will, they are called his devisees. In case he names by will a person to distribute his estate, such person is called an executor; in case he does not, the court

appoints an administrator. Real property, by the rules of the common law passes at once upon the owner's death to his heirs or devisees. Personal property goes to the executor or administrator, and then after administration (the debts of the estate and costs of administration being paid), goes to those whom the law names as distributees, or those whom the deceased by last will has named as legatees.

Personal property is first taken to pay the debts of the deceased and the costs of administration. Real property cannot be taken for this purpose unless the personal property is insufficient or unless it is otherwise directed by will. And if real property is needed for this purpose, the administrator or executor must show the need by a special proceeding, as by filing a petition setting up the amount of debts, and the deficiency of the personal property.

Thus A, owning real and personal property dies, leaving B, his widow, C, D, and E, his children. C, D, and E, get his real estate, subject to B's dower therein. M, his administrator, gets the personal property wherewith to pay the debts left by A, and the costs of administration. The personal property remaining goes to B, C, D, and E. A, by will could have governed this disposition. But even in that case the real property would pass at once to those named, the personal property first to his executor.

(2) *As to Transfer of Title Inter Vivos.* The law makes a distinction between personal and real property in respect to the method of its transfer from one living person to another. Real property can only be transferred by deed, a formal instrument of much importance in determining the time when the title passes, what sort of title passes and the restrictions

and conditions which are imposed by the seller. It is true that title to real estate may be acquired without any writing by long possession under a claim adverse to the owner but this is in no sense a transfer of title from one to another by a voluntary act. On the other hand, personal property is transferred either by bill of sale or memorandum of some sort or, in the more usual case, by mere delivery without any writing whatever, as where one buys goods at a store. In fact we may say that the transfer of land consists in the deed itself while a bill of sale in personal property is ordinarily not the transfer of title but only evidence of the transfer; that is to say, one cannot transfer title to real estate except by a deed while he may transfer and usually does transfer title to personal property by mere delivery, sometimes completing the transaction at the time when the title passes or thereafter by delivering a bill of sale as evidence of what has transpired.

(3) *As to Dower and Title by Marriage.* By the common law a husband had certain rights in the property of his wife. He took her personal property as his own absolutely. In her land he got merely a temporary estate and did not acquire title to it by his marriage. This estate is called, while the wife is living, an "estate during coverture" and after her death, the husband surviving her, it is called an "estate by curtesy." These estates are only life estates and therefore cease entirely with the death of a husband just as a tenancy in land ceases when a term expires for which it was created. Modern statutes have taken away the right of the husband to his wife's personal property and many states have also changed the estate of curtesy, although in all states a husband has still certain rights in the land of his wife.

The wife by her marriage acquired no rights to the personal property of her husband and does not do so now, for we know that personal property can be freely transferred by a man without taking any consideration of the wife in the bargain. Any other rule would retard commercial dealings in which personal property must pass rapidly from hand to hand. Of course upon the husband's death the wife has certain rights and takes a part of the personal property of which he may die possessed but that is an entirely different matter. In the land of the husband the wife gets a dower interest which is called inchoate during his life and which becomes at his death if she survives him, a dower estate, which is a one-third interest for life which the wife has in the land of her deceased husband. It is only a life estate and terminates absolutely at her death.

(4) *As to Right to Remove.* We will see in our study of fixtures that certain property may be removed if it is to be regarded as personal estate and cannot be removed if it is to be regarded as real estate. Of course the owner of the land can always tear down his buildings or dig up his soil and thereby convert real property into personal property, but where the rights of two parties are concerned, as that of landlord and tenant, or that of seller and buyer, one claiming the real property and the other the personal property, the question becomes very important what is to be regarded as personal property and removable as such.

(5) *As to Local Law Applicable.* We may say as the general rule that the law of the place in which real estate is situated governs it entirely, while for some purposes personal property is to be regarded

as situated at the domicile of the owner no matter where it actually is. This is only true in certain cases.

(6) *Other Distinctions.* The distinctions we have enumerated are the most important ones but by local law there may be other distinctions.

B. The Divisions of Property Into Lands, Tenements, and Hereditaments.

Sec. 4. THESE TERMS DEFINED. Land is anything of a substantial nature; tenements anything permanent that can be holden; hereditaments anything that can be inherited whether of a tangible or intangible sort.

Blackstone and other old writers divided property into "lands, tenements and hereditaments."[1] This distinction is not so very important to us but we will make a brief survey and it will tend to enlighten us upon the law of property and perhaps give us a better idea of the term. Land is defined by Blackstone as the ground and everything attached thereto and which extends indefinitely upward and downward.[2]

He defines a tenement as anything that may be holden; provided it be of a permanent nature; and a hereditament as anything real, personal or mixed which may be inherited.[3]

Sec. 5. INCORPOREAL HEREDITAMENTS. An incorporeal hereditament is a right issuing out of a

1. Blackstone's Commentaries, Cooley's Ed., Book II, star page, 16.
2. *Ibid*, star page, 17.
3. *Ibid.*

thing corporate whether real or personal or concerning or annexed to or exercisable within the same.[4]

This sort of property consists in the right growing out of other property and, as Blackstone shows, is not the thing itself but some right concerning the thing, that is to say, it is not the land but is a right in the land, as rent; it is not a jewel but is an office relating to jewels, etc. The various sorts of these hereditaments are briefly enumerated below.

(1) *Advowson.* An advowson was an old form of property of an intangible sort signifying a right of presentation to a church,[5] that is to say, it was the right which a person had because he had built a church or made some gift, to name the minister to officiate therein. This form of property is unknown in America because we have no connection between church and state.

(2) *Tithes.* A tithe was a right to a tenth part of the increase yearly arising from land and animals.[6] Those things were tithable which were of annual increase. This was a species of property belonging to a church or the clergy and existed as a matter of right in various cases. Any person may now give a tenth part of his income to a church but this probably would not be called a tithe, because the church has no legal right to demand it, but tithes in the old days were legally demandable. These like advowsons are unknown to our law although they were known to the English law from early times.

4. Blackstone's Commentaries, Cooley's Ed., Book II, star page, 19.
5. *Ibid*, Book II, star page, 21.
6. *Ibid*, star page, 24.

(3) *Commons.* A common was a right which a man had to make substantial profit from the land of another. This sort of right is also known by the name of "profit a prendre." Commons are of four sorts, and are discussed later.[7]

(4) *Ways or Easements.* A way or an easement is the right of one to go upon the land of another.[8] It differs from a common or profit in that it does not give the right to take anything from the land but merely to make a certain use of it. It differs from the right of a tenant, because he *occupies* the land, while the owner of an easement has no exclusive possession, but merely a right to go and come upon the land which is in the possession of another.

Easements are of two sorts, "appurtenant" or "in gross" but as they are hereafter discussed at length we may not dwell upon them here.

(5) *Offices.*[9] An office was a right to exercise a public or private employment and to take the fees and emoluments thereunto belonging.

(6) *Dignities.*[10] Dignities consisted in the right to honors and offices, as those of dukes, marquesses, earls, viscounts, and barons. They are unknown to our American law.

(7) *Franchises.*[11] A franchise is a right which one has to do things which by the general law he would have no right to do: Thus we may have the right of certain persons to carry on business as a corporation. This they cannot do except by the

7. See section 134, *post.*
8. See section 129, ff, *post.*
9. Blackstone's Commentaries, Cooley's Ed., star page, 36.
10. *Id.*, star page, 37.
11. *Id.*

franchise of the state. There were many sorts of franchises in the old law which are now obsolete, and which consisted in rights claimed by grant of the king, to have certain privileges, as the right to wrecks, estrays, etc. Under our American law franchises are not presumed to be given to favored individuals but merely to those who comply with the law. The possession of a franchise signifies the possession of a right which could not be exercised without the franchise, thus, with the right to be a corporation, or to operate street railways.

(8) *Corodies or Pensions.*[12] A corodie or pension is a right to receive certain allotments for one's maintenance.

(9) *Annuities.*[13] An annuity is the right to have a certain amount every year from some layman. By contract, as with an insurance company, one may now have an annuity, but we do not have annuities as they were originally known in England.

(10) *Rents.* A rent is defined as a certain profit issuing yearly out of land and tenements corporeal. It may consist in money or goods or services. There were various sorts of rent at common law which we need not take the time to discuss here.

12. *Id.*, star page, 40.
13. *Id.*

CHAPTER 2.

HISTORY OF THE LAW OF PROPERTY.

Sec. 6. ANCIENT LAWS OF PROPERTY. The laws of property from early until modern times were based upon feudalism, and in our law, even to-day, we see the influences of feudalism though the system itself no longer exists.

Space will not permit us to go at length into a discussion of the subject of feudalism, and the reader is referred to other authors for extensive inquiry therein.[14] But we should take occasion to examine very briefly this system which entered so extensively into the life of our European ancestors and from which our laws of property have been historically developed.

Feudalism concerned itself almost wholly with *real* property. Personal property in those days was inextensive in quantity and had little value. Only *real* property was held in feudal tenure.

Sec. 7. FEUDALISM AND THE FEUDAL TENURES. Feudalism was a military system whereby all land was held from the sovereign, mediately or immediately, who parcelled it out in return for fealty and service.

Whatever may have been the origin of feudalism, it was established in Europe by the tribes that swept

14. See Blackstone's Commentaries, Cooley's Ed., Book II, Chapter IV; Pomeroy, Municipal Law, Ch. II.

over Europe at the decline of the Roman empire. It was firmly established on the continent by 800; and in England under William the Norman.

By the feudal system the absolute ownership was in one person, a lord, or "landlord," while the use was in another known as the tenant, to whom the possession, or, as it was called, the "seisin" was given.

In England the ultimate owner was the king. But in course of time the tenant further parcelled out the land in the same way to his vassals, and these in turn, again, so that the actual occupiers and users of the soil might be many times removed from the king in whom the true ownership theoretically existed.

The system was in its origin and early development entirely military. The lord allotted the lands in return for fealty and service.

These allotments were known as "feoda, feuds, fiefs or fees." The holder of the feud was said to be *enfeoffed.*

The manner of enfeofment was as follows: First, the vassal established his *homage* to the lord. This was a ceremony in which the vassal entered into submission to his lord and became his "man," saying apt words to that end. After homage came an *oath of fealty.* Then came the transfer of the land.

This was done by conferring the present possession either by actual yielding of possession or by symbol. By the first method the land was given over before witnesses, the tenant going upon the land and publicly taking possession. By the second method a twig, piece of sod, or other symbol taken from the land was handed over in view of witnesses. No method of conveying land to take effect *in the future* was known. From this practice, it came to be said

that in the conveyance of the fee by deed of feofment there must be *livery of seisin.*

The service which the vassal was to furnish was originally of a military character and the system was purely military and arose out of military needs. The vassal was under obligation to furnish military aid as his lord might call upon him. If a vassal of the crown were called upon he could bring in a large array of his retainers to whom he in turn had granted lands.

Blackstone says that fiefs were at first granted at the lord's will, but others doubt this, and assert they were granted for life subject to fealty. In course of time they became inheritable.

At first the lord could not transfer his right of allegiance nor the tenant his land. But after a time the tenant was permitted to alien the land. Rules of descent came to be established and it became the law that the descendants of the tenant were to be his successors in the possession and ownership of the fee, but in order to keep this inheritance from division, the eldest son was the particular descendant in whom the right vested. Thus arose the rule of *primogeniture.*

The incidents or consequences of the feudal estate were as follows:

(1) *Escheats.* If the vassal died leaving no heir, his estate would return to the lord, who owned it; also, by disloyalty the estate escheated.

(2) *Aids.* Aids were payments of money made to the lord for certain purposes; to ransom his person; to pay the expense of the knighting of the eldest son; to raise a marriage portion for the lord's daughter. These payments were probably voluntary

at first, but came later to be demanded as of right, and new causes of aids were invented until they became a source of great burden. *Magna Charta* provided that no aids should be demanded except for the three purposes mentioned.

(3) *Reliefs.* A relief was a sum of money to be paid by the heir upon coming of age and taking the inheritance. It was at first an arbitrary sum and grew to be so burdensome that a law was passed to fix the amount payable.

(4) *Primer Seisin.* This was a sum payable to the king by the crown's vassals equal to the first year's profits when the heir came into possession; it was in addition to the relief.

(5) *Fines upon Alienation.* A fine payable by the vassal to his lord upon the conveyance of the fee.

(6) *Wardship.* Where the tenant died before the heir was of age, the lord had the right to be guardian of the heir and take the profits of the fee until he arrived of age. This was a very onerous incident.

(7) *Marriage.* A lord who had a female ward (the tenant having died before the heir was of age), could dispose of her in marriage. If she would not accept the proffered husband she was liable to a heavy fine. This power was supposed to be based on the right of the lord to have no one except his friends and supporters marry the female occupiers of the fee.

These burdens became so great as not to be borne. By statute in the time of Charles II they were utterly abolished.

The relation which the tenant had to his lord was governed by the ***tenure*** or kind of ***holding*** by which

the tenant held the land. Tenures were very numerous, but were principally of three general kinds:

(1) *The Military Tenure,* whose incidents we have just mentioned, the services to be granted being of a military nature. This is the true or proper feudal tenure.

(2) *Tenures in Free Socage* to which by statute all tenures were ultimately reduced. The services to be rendered were not those of war, yet such as were not regarded as base in nature, as, to pay a sum as rent. These are not pure feudal tenures, but are a natural development with the growth of society. These tenures had all the burdens as those above mentioned except of wardship and marriage.

(3) *Tenures in Villenage or Base Tenures.* Tenures in villenage were tenures calling for what were then regarded as base services, that is, menial duties. These tenants lived in *villages* near the lord's castle, and were called *villeins.* There were two sorts of tenures in villenage; those in *pure villenage* in which the tenant must give all services called for, and *villenage in socage,* in which the amount of the services he could be called upon to do was limited.

This was the system of feudalism so far as we may notice it here. It made great distinctions between real and personal property which are preserved to some extent to-day. It made personal property subject to seizure for the ancestor's debts, but not real property. This is not wholly true to-day, but the personal property of a deceased person is first subject to the ancestor's debts, before the land can be taken. This is a remnant of the feudal system. So doubtless is the rule that passes the real estate direct to the heir but puts the title to personal property in the executor or administrator.

Sec. 8. THE TENURE IN AMERICAN LAW. Land in America is held allodially, that is, by all owners in equality without superior.

The fee (a term which we get from the feudal system), is in America held *allodially*. There is in theory no superior. An owner can indeed rent his land for services to be rendered, but there is here nothing resembling the feudal system. Land is not held of the government, and there is but one sort of tenure.

Sec. 9. HISTORY OF THE LAW OF PERSONAL PROPERTY. As the age became commercial, personal property grew in importance and a large body of law concerning it developed.

In the day of feudalism personal property was of little importance. The activities were those of war and agriculture. With the dawn of our commercial age, personal property became of much importance and there are now more litigated cases concerning personal property than concerning real property.

PART II.

WHETHER PROPERTY IS PERSONAL OR REAL.

CHAPTER 3.

ANNEXATIONS TO THE LAND; THE LAW OF FIXTURES.

A. The Annexation.

Sec. 10. MANNER OF ANNEXATION; REAL OR CONSTRUCTIVE. Annexation to the land may consist in actual attachment to the land or by making the article an integral part of the land for permanent purposes though there is no actual attachment.

We will consider in this chapter the result of annexing property to the land and find that when annexed in a permanent fashion an article becomes real estate until it is detached by the person having the right to detach it. When property is so attached it is called a "fixture," this term being used in two senses, first, to indicate property which being attached does *not* become a part of the real estate, and, second, property which being attached *does* become a part of the real estate; but ordinarily we mean by the term "fixture" that the thing annexed cannot be removed, although the other meaning is often employed as when it is said that tenants have a right to remove fixtures. We will avoid this confusion by speaking of those *annexations* which do become a part of the real estate and those which do not.

The form of annexation may be either actual or constructive. Actual annexation consists in making an article a part of the real estate by nailing, screwing, setting in the ground or other means whereby there is actual attachment. The other form of annexation is by making the article a necessary part of the permanent equipment in the present use of the land without actual attachment. There are two chief forms of constructive annexation; one is where annexation is *by weight* as where heavy articles intended for permanent improvement need only their own weight to attach them to the land. The other case is that of articles which may be actually attached but must be removed at times to make way for others in their stead as where there are several saws for the same pivot only one of which can be in use at a time. All of these saws would be considered a part of the real estate, provided the one in place were so considered.

An attached article will be considered a part of the real estate whether the annexation is actual or constructive and if we once decide that there is annexation which constitutes a fixture then the article becomes a part of the real estate whether the annexation is actual or constructive. An article does not become a part of the real estate, even though it is actually attached unless attached in a permanent way, that is for the *permanent improvement* of the real estate. We will consider cases later which will illustrate and verify this point. Nothing is to be considered as constructively attached unless it is for the permanent improvement of the real estate considering its present use. Thus, we will find that a millstone in a mill is as much a part of the mill and of the real estate as the machinery which is nailed to the

floor but we will find that a table in a house is not a part of the real estate even though essential to the enjoyment of the house for it cannot be considered as a permanent improvement. So we find that cars on a railroad track are a part of the realty,[15] and therefore pass with a sale of the railroad, unless reserved, but wagons on a farm are not real estate.

Our inquiry, however, cannot make much progress until we consider the relation to the land of the party who makes the annexation. What we have said is merely of a general nature in order to come to an understanding in a general way what we mean by the term fixture and what we intend to indicate in its use.

B. Effect of Annexation.

Sec. 11. THE GENERAL RULE. Intent governs. The general rule is that the annexations to the land become a part of the real estate according to the intent of the party annexing them.

In discovering whether or not an article annexed to the real estate becomes a part of the real estate we inquire of the *intent* of the party in making the annexation, although this is to a certain extent a fiction, for we will not allow him to say what his actual intent was, where in the average case there would have been no such intent as he now alleges. In the next section we indicate how we arrive at the intent.

Sec. 12. THE TWO ELEMENTS IN DETERMINING INTENT. In determining the intent of the party attaching the property to the real property we consider, first, his relationship to the land, second, the manner

15. Titus v. Mabee, 25 Ill. 257.

of the annexation; in order to decide whether the property has become a permanent part of the real estate or maintains its character while so attached as personal property.

We have seen that we look to the intent of a person who actually or constructively attaches an article to the real estate in order to find whether it becomes real or remains personal property. That intent is discovered from two circumstances. The first one is the *relation* which the party bears to the land, and the second one is the *manner* of his annexation. If he has only a temporary interest in another man's land the presumption is that he did not intend to permanently increase its value at his own expense, yet at the same time if he incorporates the article so firmly into the real estate that its removal would be difficult the presumption is that notwithstanding his passing interest, he intended to permanently improve the land. We will now notice the situation in respect to various parties and endeavor to state what the rule is in each case.

Sec. 13. ANNEXATIONS BY THE OWNER BEFORE SALE. The annexations by an owner of land before he sells it, whether slight or extensive, become a part of the real property and pass with its sale.

Suppose that A owns land upon which he places fences, barns, pumps, and the like, attached in some way to the real estate and then sells the land to B, not in any way mentioning the articles annexed to the land. The rule is here, that as he was the owner it is to be presumed that whatever he attached was for the permanent improvement of the land whether the

attachment was slight or extensive; and while he might of course remove all such fixtures *before making* a sale, yet if he makes a sale of the land without having previously removed such articles and without reserving them in the deed or contract of sale, they form a part of the land and therefore pass with its sale even though not mentioned. After the sale or contract of sale, A could not remove any of these articles upon the ground that they were personal property, because B could claim that they were a part of the real estate which he had bought or contracted to buy; having become so by annexation. This would be true of all articles whether actually or constructively annexed. Thus, buildings and fences, machinery attached to the land, as wheels, pulleys, etc., articles for domestic use, if attached to the land (or the buildings thereon) belong to the purchaser. Unattached articles, however, of ever so cumbersome a character, as reapers, threshing machines, and the like, are not real estate and do not pass with the sale unless the articles are really a part of the permanent equipment of the land, in their nature to be regarded as for permanent improvement, like rail fences, millstones, rolling stock, window-shutters, etc., which although unattached go with the land. And of course such attached articles as pumps, windmills, hitching-posts, fences, buildings of all sorts, and the annexations therein, such as partitions, awnings, gas fixtures, steam pipes and coils, shelving, etc., go with the land as a part thereof, unless reserved.[16]

16. **The reader must be cautioned that it cannot be said as a *matter of law* with respect to many classes of articles that they are or are not fixtures; and furthermore, that the courts, in applying general rules to vari-**

Sec. 14. ANNEXATIONS BY SELLER IN POSSESSION AFTER SALE. The annexations of a seller who is in possession after the sale are to be regarded in the same way as those annexations before the sale.

The same rule applies here as in the section above. The annexations of the former owner, unless he has a lease (in which case he is to be considered as any ordinary tenant), become a part of the real estate and accrues to the new owner.

Sec. 15. ANNEXATIONS BY PURCHASER IN POSSESSION UNDER A DEFEASABLE TITLE. A purchaser who goes into possession under a title that may revest in the seller is to be regarded as making annexations for the permanent improvement of the land and if the title revests in the former owner the annexations pass to him.

One who goes into possession under a defeasable title or under a contract of sale or under a conditional sale of any sort whereby because of nonpayment of installments or other failure the title may revest is to be regarded as having a permanent interest in the land and therefore his improvements are to be regarded as permanent ones, and the same rule applies in his case as in the case of any owner, and the annexations will pass upon the defeasance of his title to the former owner. Thus if A sells prop-

ous sets of fact have not always been in harmony. On the contrary, with respect to steam coils, chandeliers and many articles that might be enumerated, there are authorities both *pro* and *con* to be found. But the author has endeavored to show the general rule and the reasons therefor, and to give illustrations which will not mislead.

erty to B under a contract of sale whereby B is to make twenty monthly payments before he shall get a deed, articles annexed by B to the real estate become a part thereof and if B's title by reason of his failure to keep up the installments revest in A, A gets the improvements. The same rule is true where title has actually vested, subject to a condition that may defeat it.

Sec. 16. ANNEXATIONS OF A MORTGAGOR IN POSSESSION. The same rule applies here as in the case of a grantor as set out in section 13.

A mortgagor in possession is to be regarded as having a permanent interest in the land and his annexations become a part of the security of the mortgagee and cannot be removed after attachment.

Sec. 17. ANNEXATIONS OF A MORTGAGEE IN POSSESSION. The annexations of a mortgagee in possession become a part of the real estate.

The same rule applies here as in the case of the grantor as described in section 13.

Sec. 18. ANNEXATIONS BY A TENANT. The annexations of a tenant for household or trade purposes do not become a part of the real estate unless attached in an extensive manner so that their removal would seriously injure the real estate or destroy the identity of the thing attached, but the fixtures must be removed during the term.

When we come to the case of a tenant we consider one who has only a passing right to the land and he is not to be considered as permanently im-

proving the real estate[17] except as the extensive character of the annexation may show that to be true. If a tenant erects buildings upon the land, or fences, or plants trees, or puts up any permanent structure, these are unquestionably a part of the real estate and therefore as soon as annexed belong to the owner, subject to the lease, and cannot be removed by the tenant, but the articles which he attaches for household, ornamental, or trade purposes can be removed by him even though they are screwed or nailed to buildings, provided a severence of them is not difficult. If a tenant should equip a building with pipes extending through the walls or should place panes of glass in the windows, or should build a porch to the house, he could not take any of these down without the consent of the owner, but if he attaches brackets to the wall, towel hangers, etc., in the bathroom, globes to the gas fixtures, or if in his shops he puts up pulleys, sets up printing presses or attaches any sort of machinery not actually built in the place, he can remove them; so a nurseryman can remove trees planted by him for nursery purposes, but not trees of other sorts. The same would be true of shrubs and bushes. The rule to apply in every case is, that if the article is removable without seriously injuring the real estate at that place the tenant can remove it, as it is not to be presumed that he put it there for permanent improvement.

The tenant must remove the fixtures during or immediately at the expiration of the term; he cannot afterwards come back and claim the property left by him.

17. McDavid v. Wood, 5 Heisk. 95.

It was the rule of the common law that a tenant could not remove those fixtures attached by him under a former lease. In other words, by merely renewing the lease he lost his right to fixtures put in under the old lease,[18] but statutes in some states, recognizing the injustice of this rule, have changed it.

18. Chicago Sanitary District v. Cook, 169 Ill. 184 In some jurisdictions the rule is modified or even departed from.

CHAPTER 4.

INCREASE OF THE EARTH.

Sec. 19. THIS TERM DEFINED. By increase of the earth we mean the product which grows thereupon either with or without man's assistance.

We are to consider in this chapter the character of those things which grow upon the earth. They may be broadly defined into those things which reproduce themselves perennially and those things which are produced in yearly crops by man's toil. Those fruits of the earth which grow without yearly planting, as vines, trees and grasses are called *fructus naturales.* Those which are produced by man's toil are called *fructus industriales.*

Sec. 20. CHARACTER OF TREES, VINES, ETC. Those things which grow perennially as trees, vines, grasses and the like are real property for all purposes.

Trees except those planted for nursery purposes are a part of the real estate and to be considered as a part of the real property for all purposes. This is true of vines, grasses, and the produce of every sort which is of a perennial nature.

Sec. 21. OWNERSHIP OF CROPS AS BETWEEN BUYER AND SELLER OF LAND. As between the buyer and seller of land, crops pass with the sale unless reserved.

Crops, whether they are mature or immature, pass with the sale of the land unless reserved at the time

and the buyer may claim them as a part of the real estate.[19]

Sec. 22. OWNERSHIP OF CROPS AS BETWEEN MORTGAGOR AND MORTGAGEE. The mortgagor is entitled to the crops except upon default.

In the mortgage of the land the crops are to be considered as a part of the real estate. But it must be noticed that the mortgagee has no right to the crops so long as the debt is immature and the mortgagor is in possession. The mortgagee cannot claim the crops in any case even where default has occurred except to reduce the debt.

Sec. 23. OWNERSHIP OF CROPS BETWEEN LANDLORD AND TENANT. The tenant is entitled to the crops except where he plants them to mature after the tenancy ceases.

A tenant is entitled to crops planted by him unless he plants crops to mature after his term is at an end. Where the tenancy is of an indefinite duration the tenant cannot be deprived of the crops which he has been permitted by the landlord to plant, by the landlord's termination of the tenancy.

Sec. 24. CROPS REAL OR PERSONAL FOR PURPOSES OF SALE. Crops are considered as personal property for purposes of the sale of the crops.

Growing crops may be sold as personal property.

Sec. 25. CROPS, REAL OR PERSONAL, FOR PURPOSES OF LEVY. Crops are personal property for the purpose of levy by an officer of the law under an execution.

19. Firebaugh v. Divan, 207 Ill. 287.

CHAPTER 5.

WATER AND ICE, ETC.

Sec. 26. CHARACTER OF WATER AS PERSONAL OR REAL. Water is real property while in ponds, rivers, etc., but becomes personal property upon being piped out or bottled or in any way separated from the soil.

The water in a pond or river or lake is not susceptible of ownership, in the sense that any particular particles thereof can be permanently claimed, for water is a "movable, wandering thing"[20] subject to evaporation, and passing from one man's land to another, but in the sense that the rights to ponds and rivers pass with the real estate, the water which is at any particular time on the property may be considered a part of the property. When water is bottled or carried away in any manner it becomes personal property.

Sec. 27. CHARACTER OF ICE AS PERSONAL OR REAL. Ice is to be considered as a part of the real estate unless cut therefrom, in which case it becomes personal property.

The ice on a man's land is real estate; being gathered, it becomes personal property.

Sec. 28. CHARACTER OF ROCKS, STONES, ETC. Rocks and stones whether imbedded in the soil or lying upon it in the natural position are a part of the real estate; but being gathered they become personal property.

20. Blackstone's Commentaries, Cooley's Ed., Book II, star page, 18.

PART III.

THE ACQUISITION OF TITLE TO PERSONAL PROPERTY.

CHAPTER 6.

ACQUISITION OF TITLE TO PERSONAL PROPERTY BY PURCHASE.

Sec. 29. SALE AND BARTER DEFINED. Where personal property is transferred for a money consideration the transaction is called a sale; where it is transferred for other personal property it is called a barter.

It will be unnecessary to go at any length here into a discussion of the subject of Sales of Personal Property, because that subject is covered in volume 3 of this series; yet we may devote a brief chapter to its consideration to give completeness to this volume.

Where personal property is sold for money either paid down at once or to be paid at a later date, the transaction is called a sale. A sale is a transfer of ownership for a consideration called the "price." A barter is a transaction in which personal property is exchanged for other personal property as where A trades a horse to B in return for a buggy. Sales and barters are similar transactions, differing only in the nature of the consideration.

Sec. 30. SALES OF A PARTICULAR THING OR THING OF A CLASS. A sale may be of a particular

identified object or may be of an unidentified article by description.

One may sell a chair known and described at the time of the bargain; or he may sell a chair to be afterwards selected out of a particular stock either by him or by the buyer; or he may sell a chair according to a certain description, simply being under obligation to furnish a chair from any source answering that description. The importance of this matter depends upon the fact that *ownership or title* cannot be transferred until the article is identified. Whether the title passes when the article is identified is a different question. Thus, if I make a contract of sale of a chair I may transfer the ownership at once or simply contract to transfer it later. But title cannot possibly pass in any case until identification.

Sec. 31. SALES AND CONTRACT TO SELL. A sale is a transaction in which title passes from seller to buyer while a contract to sell of itself confers no ownership.

We use the term "sale" in a loose way to describe all those transactions in which transfer of ownership is effected or contemplated; and in a strict way to indicate the transfer of ownership, the passing of title, as we say. A contract to afterwards transfer title is a "contract to sell" as distinguished from the "sale" itself, which transfers ownership. Until there is an actual *sale* in this narrow sense the purchaser has no right to the article itself no matter how many rights he may have upon his contract for damages. It is of importance then to know when title passes.

Sec. 32. THE TRANSITION OF TITLE. The transition of title takes place according to the intention of the parties subject to certain technical rules of law.

It is for many reasons important to know when title passes. Title to an unascertained article, as we have seen, cannot be transferred. It is absolutely essential that the article be ascertained at the time of the transition of title. Until the specific article is set apart or in some way identified, there may be only a contract to sell and not a sale itself. After identification, title passes according to the intention of the parties, and the law has laid down certain rules by which to arrive at the intention. Reference is made to volume 3 of this series for enumeration of all those rules.

Sec. 33. THE DUTY OF THE SELLER NOT TO DECEIVE. The seller must not deceive the purchaser, but he is under no duty to make disclosure of those things which the buyer has the opportunity to discover himself.

The usual rule in sales is *"caveat emptor."* The buyer must beware that he gets a good bargain; yet the seller must not be guilty of fraud or deceit, that is to say, must not make false statements of fact to accomplish the sale; but the seller is under no duty to disclose defects which the buyer can discover by his own investigation. The seller however must not keep the buyer from making inspection. If the defect is not discoverable by ordinary inspection the seller, if he knows of it, must disclose it even though the buyer asks no questions in that respect. Thus if

cattle have "Texas fever" the seller cannnot keep silent if he knows of their condition, and his silence will amount to deceit.

Sec. 34. THE CONTRACT OF THE SELLER; WARRANTIES. The seller may by his contract expressly or impliedly warrant the article sold.

The simplest case of a sale is that of a particular article, title to which is transferred at once without any express warranties. In such a case, there are no warranties except that the seller has a good title tc the thing sold. Warranties, however are very common. They are of two sorts: express and implied. The express warranties are those made in writing or orally, respecting the condition or quality of the goods. The implied warranties are those to be inferred from the circumstances. The seller makes an implied warranty that he has title and right to sell. If he sells by *description,* he warrants that he will furnish goods of that description and that they will be merchantable. If he sells *for a particular purpose* he warrants that the goods are fit for that purpose. For an enumeration and a description of warranties, reference is made to volume 3 of this series.

CHAPTER 7.

ACQUISITION OF TITLE TO PERSONAL PROPERTY BY GIFT.

Sec. 35. GIFT DEFINED. A gift may be defined as a transfer of ownership of personal property without consideration.

In the last chapter we discussed the transfer of personal property for a consideration. Such a transfer is the result of a contract. In this chapter we notice the transaction in which title passes from one to the other for no return or compensation. There may be a valid contract to make a sale, but none to make a gift, for if we assume we have an enforcible contract our definition of a gift prevents us from calling this contract or any execution or result of it, a gift. A gift is gratuitous, made as a favor and not as a duty. It becomes apparent then that a gift must take effect at once and that there can be no executory contract to make a gift. Either title passes when the gift is made or there is no gift.

Sec. 36. GIFTS ARE INTER VIVOS OR CAUSA MORTIS. Gifts may be described as those made between living persons or those made in contemplation of death, to take effect upon death.

Most gifts are those between living persons, but a person may make a gift in contemplation of his impending death. We call the former class of gifts

those *inter vivos* and the latter class those *causa mortis*.[21] There is an importance in distinguishing between these two sorts of gifts because the gift *inter vivos* when finally made is irrevocable while a gift *causa mortis* does not take effect if the giver recovers from what he thought, when he made the gift, was his last illness. If a giver then desires to revoke a gift it might depend upon whether it were a gift *inter vivos* or *causa mortis* whether he could do so.

Sec. 37. ESSENTIAL ELEMENTS OF A GIFT INTER VIVOS. In a gift inter vivos it is essential that possession be delivered to the donee with the purpose of at that time transferring title.

As we have said there is no such thing as a contract to make a gift of personal property. In order to transfer by gift the gift must actually be made; the giver must hand over the article with the intention and for the purpose of transferring title at that time. It is not necessary that he make a manual delivery provided he does some act which may be regarded as a symbolical delivery. Thus, if he should give an article in the warehouse it would be sufficient if he transferred the warehouse receipt, or if he should give a trunk or the contents thereof it would be sufficient if he finally transferred the key,[22] or if he gave a horse in a stable it would be sufficient if he put it in the power of the donee to take the horse, saying that it was his.

21. For a discussion of the two kinds of gifts, see Telford v. Patten, 144 Ill. 611.

22. Marsh v. Fuller, 18 N. H. 360.

Sec. 38. IRREVOCABILITY OF GIFT INTER VIVOS. An executed gift inter vivos is irrevocable.

Though there may be no enforcible agreement to make a gift, yet when a gift is actually made, it transfers as complete a title as a sale or barter does. One who receives property by gift becomes the owner thereof, the giver has parted with his rights thereto and no matter how much he may repent he cannot recover what he has given away. A gift actually completed by final delivery is irrevocable.

Sec. 39. ESSENTIAL ELEMENTS OF A GIFT CAUSA MORTIS. In a gift causa mortis there must be actual delivery; the giver must regard himself as in his last illness and must give the property because of his impending death.

In the gift *causa mortis* the same elements in respect to transfer of possession with the intention of passing title must be present. But to constitute a gift *causa mortis* as distinguished from one *inter vivos,* it must be made on account of the death which the giver expects to soon ensue. As we have noticed, if a gift were really made because of death and death does not ensue the article may be recovered and this is the reason for inquiry whether it was a gift *causa mortis.* It must be borne in mind that in a gift *causa mortis,* the possession of the thing must be given over to the donee as completely and finally as in a case of a gift *inter vivos* for if there is simply a promise to make a gift at death this confers no rights to the article and if the statement is made that a person may have a certain article at death this gives no rights unless the statement is made in a regularly executed will.

Sec. 40. RIGHTS OF CREDITORS OF THE GIVER IN RESPECT TO THE GIFT. A debtor who is insolvent cannot deprive his creditors of his assets by giving them away.

While a gift transfers as good title as a sale or barter, yet there is a phase of the law which we will notice here which prevents the donee from getting a good title, *as against the creditors* of the giver, provided the giver is insolvent when he makes the gift or by the gift brings on insolvency. In that case the creditors may, by appropriate judicial proceedings, take the property from the person to whom it was given and this is no hardship upon him for he parted with nothing on account of the gift and ought not to be enriched at the expense of the creditors of the giver.[23]

23. See Volume VII, sec. 97.

CHAPTER 8.

ACQUISITION OF TITLE TO PERSONAL PROPERTY BY FINDING.

Sec. 41. DIFFERENCE BETWEEN LOST PROPERTY AND MISLAID PROPERTY. Lost property is that which has been dropped by the owner so that he has no knowledge of the accident, while mislaid property is that which has been put in a certain place and then forgotten.

We know what we mean in popular sense when we speak of a thing as having been "lost" and in such a sense this term is often used to include property which was put in a certain place and its whereabouts then forgotten, but this in the law is known as "mislaid" property as distinguished from lost property. To be lost, property must have accidentally dropped from the owner as where a ring slips from his finger to the ground. If he puts it aside and then forgets its whereabouts, the property is said to be *mislaid.*

Sec. 42. THE TITLE OF A FINDER OF LOST PROPERTY. One who finds lost property becomes the owner thereof as against all the world except the true owner.

One who finds personal property which has been lost by the owner becomes the owner against all the world except the true owner no matter upon whose property the lost article was found. Thus, if A loses

a diamond while walking over B's land and C finds the diamond, C is the owner as against B and all the rest of the world except A and if A does not claim the stone it becomes C's.[24]

An exception must be made to this rule in the case of chattels which are buried in or attached to the earth for this becomes a part of the real estate and belongs to the owner of the soil. An exception to this exception was made in early days in the case of "treasure-trove" which was gold, silver, or other coin or bullion or plate concealed in the earth and this went, as in the case of lost property, to the finder if the owner was unknown. By an early statute this rule of the common law was changed and treasure-trove vested in the crown but in this country it seems to be the law that treasure-trove belongs to the finder.

Sec. 43. THE TITLE OF A DISCOVERER OF MISLAID PROPERTY. Mislaid property belongs to the owner of the place where it is mislaid as against the finder and all the rest of the world except the true owner.

If A goes into B's shop and while there lays a book upon B's counter and then departs forgetting it and C comes in and discovers the book, the title is in B as against C and all the rest of the world except A. As to A, B is bailee of the book but if A never claims it B becomes the owner as to everyone. Thus the rule in case of mislaid property is different from the rule in the case of lost property.[25]

24. Hamaker v. Blanchard, 90 Pa. St. 377.
25. Kincaid v. Eaton, 98 Mass. 139.

CHAPTER 9.

ACQUISITION OF TITLE TO PERSONAL PROPERTY BY REDUCTION TO OWNERSHIP.

Sec. 44. PROPERTY WITHOUT OWNERSHIP; WILD ANIMALS, ETC. Animals of a wild nature and any property which has been abandoned by the former owner may be made the subject of ownership by reduction to possession.

Property may be without any private ownership. In such a case it belongs to the sovereign as the representative of the people. It does not belong to the sovereign in the sense that property does which is owned exclusively by the sovereign. Thus, the state of Illinois may own property in the same sense that an individual may, but its ownership of wild animals is of another nature, in this, that anyone may take the title by reduction to ownership. Any such animal can become the subject of ownership by the one who so reduces him but animals of a wild nature remain the subject of ownership only while they are confined or kept within the control of the capturer, or domesticated. If a wild animal escapes or is allowed his liberty and not recaptured, he becomes again without ownership except by the state.

If one is a trespasser upon the land of another he cannot reduce to his possession the wild animals upon that land.

One acquires title in wild animals by placing them under his control and it is not necessary that there be actual capture so long as he does not abandon the chase. In other words, if A wounds an animal so that it cannot escape but has not yet overtaken it and B interferes and takes manual possession of the animal, A is his owner thereof for he was the first to subject it to his control, but if A had not wounded it in such a way that it could be said to be sure of its capture by pursuing the chase he would not acquire the ownership of it.[26]

One acquires title to fish in the same way that he acquires it to other wild animals. One cannot fish in the waters belonging to another but he may fish in public waters except that the abutting owner has the exclusive right to the shore above high water mark. For example, any one may fish in the Great Lakes but may not trespass upon the land of riparian owners in order to do so.

26. Pierson v. Post, 3 Cai. (N. Y.) 175.

CHAPTER 10.

ACQUISITION OF TITLE TO PERSONAL PROPERTY BY CONFUSION AND ACCESSION.

Sec. 45. CONFUSION DEFINED. Confusion consists in the mixture of goods belonging to different persons so that the property of each cannot be identified from that of the others.[27]

We now consider the case of property which becomes commingled with the goods of another so that it is impossible to separate the property into the original masses. The question then arises: to whom do the goods belong? The mixture might be either innocent or wrongful.

Sec. 46. THE TITLE ACQUIRED BY CONFUSION. If confusion is wrongful it seems to be the law that the title of the wrongful doer is lost and the mass belongs to the other party. If the confusion is innocent or by accident each one owns his proportional part and the former owners are owners in common.

The law on the subject of confusion is itself in confusion[28] and the cases have been decided differently, but it seems to be the weight of authority, however, that if goods are wrongfully mixed with the

27. Hesseltine v. Stockwell, 30 Me. 237.
28. Ryder v. Hathaway, 21 Pick. 298.

goods of another the wrongdoer loses his title, especially if the value of his goods is less than the value of the other goods and the same rule seems to apply in the case of one who is merely negligent. It is necessary in these cases in order to have this result, that the goods cannot be separated, for if the mixer can prove the identity of his own goods he does not lose ownership in them. Confusion then is practically never possible, except goods of the same sort are mixed as grain with grain, old iron with old iron, wine with wine, etc.

Where the mixture is innocent then if both parties are responsible they become tenants in common; if wholly due to one party's act the courts will make equitable distribution.

Sec. 47. ACCESSION DEFINED. Title by accession is that title which one gains because the property of another is incorporated with his own, or because he has changed the character of another's property by the bestowal of his labor thereupon.

In *confusion* we have a mixture of similar masses, the character of the new mass thus formed remaining unchanged, and remaining capable of separation into the original masses by mere division; in accession we have the *incorporation* of one person's property with the property of another so that the separation into the original masses becomes either impossible or at least a matter of *tearing down*, or we have a change in the character of one's property by the labor of another. We assume also that there is no contract or understanding between the parties as to the result. Thus one without another's consent, either with wrong motive or innocently, uses that other's boards in his

carriage, or makes that other's clay into bricks, or in making wine uses his own and another's grapes. What of the resultant title?

Sec. 48. THE TITLE ACQUIRED BY ACCESSION. Where accession is innocent the weight of authority seems to be that the owner of the property may follow it and retake it so long as he can identify it but where the accession is wrongful he may retake it together with the articles to which it is added and together with the value of the services which have been bestowed upon it.

The subject of accession like that of confusion is not entirely clear,[29] the cases not being as numerous as might be expected and the authorities being in conflict. It is therefore hard to lay down the rules. It seems, however, that the law may be generally stated about as follows: That if the accession of goods to other's goods has been wrongful the party who has made the addition or bestowed the labor will lose the property and has no right of compensation for his labor, while if the accession is innocent and there has been no loss of identity, the original owner may follow the property, but must make reimbursement for the labor bestowed or additional value. In this case it is necessary that the property do not lose its identity by the accession. It is difficult to state at what point the article loses its identity. Turning wood into lumber, grain into whiskey, and similar changes have been held not enough to destroy identity. Where the accession is wrongful but the increase in value is very great it is doubtful if the original owner would ac-

29. Lampton v. Preston, 1 J. J. Marsh, 454.

quire the right to the new articles unless it was a deliberate case of theft or malice. Where the article innocently taken does lose its identity, then all the former owner has is a right to recover its value when it was taken.

The authorities are in conflict when it comes to illustrations. Does cloth made into a coat lose its identity? Milk made into cheese? Grain made into malt? Clay made into brick? The authorities are in conflict. In reference to title by *confusion*, one judge says, "Few subjects in the law are less familiar, or more obscure than that which relates to the confusion of property." [30] In reference to *accession*, one court says: "There is therefore no definite settled rule on the question." [31]

30. Rider v. Hathaway, *supra*.
31. Lampton v. Preston, *supra*.

CHAPTER 11.

SPECIAL TITLE BY BAILMENT AND CHATTEL MORTGAGE.

Sec. 49. BAILMENT DEFINED. Bailment exists whenever one person has possession of personal property, the title to which is in another. The owner is called the bailor, the holder the bailee.

, Whenever we have ownership of personal property in one person and the possession of that property in another, we have what is called a bailment; the owner is called the bailor and the holder is bailee. It is essential to bailment that the bailee have possession of the property.

Sec. 50. VARIOUS WAYS IN WHICH A BAILMENT ARISES. Bailment arises by contract, finding, theft, or any method which separates the possession from the title.

We have said that a bailment exists whenever the possession is in one and the title in another. No matter how this comes about a bailment exists. Thus, if an agent has property of his principal to sell or to use in the agency, or if one finds property, or steals it, or borrows it, he is a bailee so long as he keeps the property. Where goods are sent on commission to be disposed of for the benefit of the sender, all unsold goods to be returned to the sender, this is a bailment as distinguished from a sale. Where goods are sold

on credit there is no bailment, for title passes to the buyer and he becomes both owner and creditor.

Sec. 51. KINDS OF BAILMENT. Bailments are broadly divided into two sorts—ordinary and exceptional bailments and ordinary bailments are divided according to the benefit of bailor or bailee or both.

We may tabulate bailments as follows:

(1) Ordinary bailments.
  (a) Bailments for the benefit of the bailor.
  (b) Bailments for the benefit of the bailee.
  (c) Bailments for the benefit of both.

(2) Exceptional bailments or bailments of carriers, inn-keepers, and the like, upon whom the law places a special degree of care.

Sec. 52. DUTY OF CARE BY BAILEE. The bailee's duty of care in ordinary bailments is graduated according to the benefit to him compared with the benefit to the bailor but in all cases he must use good faith in keeping the goods. In exceptional bailments the bailee has a very high degree of care and as to many causes of loss is an insurer.

If the bailment is entirely for the benefit of the bailee the cases have held that he should exercise a very high degree of care;[32] as where, for his own benefit, he borrows an article. They have held that where the benefit is for the bailor alone that the bailee need only use slight care[33] but this is better stated by saying that he must display good faith in the keeping of the goods, and this graduation of care has

32. Coggs v. Bernard, 2 Ld. Raymond, 909.
33 Gray v. Merriam, 148 Ill. 179.

been criticized, yet it is doubtless true that where the bailor, for his own benefit, requests the bailee to keep goods for him gratuitously that the courts will not hold such bailee to the degree of care required in the case above stated. Where the bailment is for the benefit of both then the care of a reasonably prudent man, or as it is said, ordinary care, must be used in keeping the goods, that is to say, the bailee is responsible if through his negligence in keeping the goods they are lost or damaged.[34] In the case of exceptional bailees a very high degree of care is imposed. A carrier of goods is an insurer of the goods except where they are destroyed by an act of God, by public enemy, by their own inherent defect or by the fault of the shipper, but by special contract with the shipper, he may modify his liability except for loss caused by his negligence. An act of God is defined as any calamity of a violent nature not caused by man's intervention and which could not have been foreseen or guarded against, such as hurricanes, lightning, flood and the like.

A bailee of goods cannot make use of them for his own benefit unless that is the contract of the parties or the nature of the goods requires such use.

Sec. 53. THE LIEN OF A BAILEE. A bailee has a lien for services or expenses.

All bailees by the common law did not have liens. Exceptional bailees had liens and so did warehousemen and pledgees and all bailees who had put expense or labor for the improvement of the goods. The lienor had the right to hold the goods for the payment of

34. Standard Brew. Co. v. Bemis Co., 171 Ill. 602.

charges. Such lien was lost by voluntarily parting with the goods.

Sec. 54. TITLE BY CHATTEL MORTGAGE. A chattel mortgage is a conveyance of personal property in security for a debt or other obligation.

In a chattel mortgage property is conveyed to secure a deed or other obligation. A chattel mortgage differs from a pledge or other bailment in its form and in the formalities required and in the sense that the goods may be either with the mortgagor or mortgagee as the contract of the parties may provide. See volume 7 of this series for a full discussion.

PART IV.

ESTATES IN REAL PROPERTY.

CHAPTER 12.

CLASSIFICATION OF ESTATES IN REAL PROPERTY.

Sec. 55. GENERAL STATEMENT. An estate in land is that duration of ownership which one has therein.

A person may own property absolutely or own a limited estate therein. There are many estates. From the following section and the chapters just following we may gain a clear conception of the meaning of this term.

Sec. 56. A TABULATION OF ESTATES. Estates may be tabulated as follows:

A. Present Estates.

I. FREEHOLD ESTATES.
  (1) Estates in fee simple, or estates without limitation in time.
    1. Fee simple estates.
    2. Estates in fee tail.
  (2) Life estates.
    1. Conventional life estates.
      a. Estates for one's own life.
      b. Estates for the life of another.

2. Legal life estates.
   a. Estates of dower.
   b. Estates of curtesy.

II. ESTATES LESS THAN FREEHOLD.
   (1) Estates for years.
   (2) Estates from year to year.
   (3) Estates at will and by sufferance.

B. Future Estates.

I. Estates in remainder.
   (1) Vested remainders.
   (2) Contingent remainders.

II. Estates in reversion.

This table is not strictly logical as the future estates in reversion and remainder are also to be classed as estates in fee simple. But it is the table usually employed and fairly indicates the various legal estates. In subsequent chapters we discuss all of these estates.

A freehold estate may be defined as any estate which may last a life time and may be of inheritance. Life estates and estates in fee, are freehold estates.

CHAPTER 13.

ESTATES IN FEE SIMPLE.

Sec. 57. THE FEE SIMPLE DEFINED. "Tenant in fee simple (or as he is frequently styled, tenant in fee) is he that hath lands, tenements or hereditaments to hold to him and his heirs forever, generally, absolutely and simply, without mentioning what heirs, but referring that to his own pleasure, or the disposition of the law."

The above definition is that of Blackstone (Book II, Ch. 7, p. 104). A fee simple estate is an estate unlimited in time, that is to say, an estate which one holds absolutely, to do with as he pleases (within the law) and which being undisposed of by him at his death goes to his heirs generally, as named by the law. We say that A owns a lot in Chicago; we mean thereby that he owns it in fee simple; that he is not merely a lessee; that he is not merely an owner for life, the real ownership being in another; but that it is *his* forever, and that he may sell the entire interest in the land or dispose of it by will. We say that he holds it to himself and his heirs, meaning that no other person except his heirs may claim it if he dies having not disposed of it by deed, will or otherwise; that B cannot claim as remainderman; that C cannot claim it as reversioner, but that X, Y, and Z, A's heirs, can claim it because it was real estate that belonged to A, whom they succeed. The fee to all privately owned land, must be in some one—the

party to whom or to whose heirs it must ultimately come. Thus the lot owned by A, may be rented to B, or C may have a life estate therein, but A owns the fee. As owner of the fee he may sell it to M, who then becomes the owner of the fee, subject to the briefer estates that may be held therein.

Sec. 58. HISTORY OF THE ESTATE IN FEE SIMPLE. The fee simple estate was originally the estate which was enfeoffed under the feudal system, in return for service or rent to the lord who allotted it, and was distinguished from lands held allodially, that is, without superior.

The term "fee" comes to us from *feudalism*, meaning the same as *feud* or *fief*, which we have heretofore described, being that estate which one had of a superior, and for which he was bound in fealty and must render a service or a rent, which land as we have seen, came ultimately to pass to the feoffee's heirs. But now we simply mean land held absolutely, that land in which one has the highest estate possible in the law—the ultimate ownership.

Sec. 59. WORDS NECESSARY TO CREATE FEE. At common law the word heirs was necessary to create a fee but this has been changed by statute in many states.

By the common law in the creation of a fee simple it was necessary to use the word "heirs." Thus a fee was created by conveying to "A and his heirs," for if one conveyed simply to A, A took a life estate reverting to the grantor. By statute this has generally been changed so that a deed to A by one owning the fee vests the ownership of fee in A and

the word heirs is not necessary and in fact is seldom used.

Sec. 60. THE RULE IN SHELLEY'S CASE. The rule in Shelley's case was, that where a grant or gift was made to a person and in the same instrument the same estate was limited to such person's heirs, the first taker was thereby given the fee.

The rule in Shelley's case was a highly technical rule of conveyance which we should notice briefly because of its importance in the history of real property. It was a rule announced in a case, known as "Shelley's Case" in the twelfth century and has since been the law unless changed by statute. It simply was to the effect that if a grant or will was made to A and in the same document to A's "heirs," the word "heirs" was used merely to describe A's estate and not for any other purpose and gave A the fee and the heirs nothing except as they inherited from A. This was a technical rule of property and was so strong that it even defeated the intention of the grantor or donor as the law fixed a certain meaning to this word when so used and did not allow it to be said that it was used in any other sense. It would be unwise for us to attempt any more elaborate discussion of the doctrine than this. In some of the states this rule has been abolished, but in others, it is still the law.

Sec. 61. QUALIFIED AND BASE FEE SIMPLES. A qualified or base fee simple is a fee upon condition or subject to a qualification.

It is possible to hold a fee and yet hold it in a base or qualified way as where land is granted to A

and his heirs so long as they shall continue to occupy it or so long as A shall remain unmarried. In this latter case if A never marries the qualified fee passes into an absolute one and A's heirs have an absolute fee simple.

Sec. 62. THE FEE TAIL DEFINED. A fee tail was an estate to one and a particular class of his heirs.

A fee simple was to one and his heirs generally. A fee tail is an estate to one and a class of his heirs. Thus an estate to "A and the heirs of his body" creates a fee tail. The heirs must be mentioned as a class of heirs, not as particular individuals. Thus an estate to "A and his son John," would not be a fee tail because John is named as an individual although had the first description been used, John might have fulfilled that description. When we speak of "entailed estates" we mean estates that because of a grant in fee tail, pass from ancestor to a particular class of heirs.

In the United States we have generally abolished the fee tail. We do not have entailed estates.

CHAPTER 14.

THE LIFE ESTATES OF DOWER AND CURTESY.

Sec. 63. DOWER DEFINED. Dower is a life estate which a widow has in one-third of the lands of which the husband was seized during coverture.

The estate of dower is often misunderstood by laymen. Many persons think it to be a portion of the husband's lands which the wife inherits at his death. But this is a misapprehension. Dower is that estate which the wife has in those lands of which the husband was seized during coverture, and that estate is defined by the law to be a life estate in one-third of all such lands. There is no estate of dower unless the wife outlives the husband and if she does outlive him the value of her estate depends on her age at his death. If the husband dies leaving a wife of eighty years of age, the likelihood is that the wife will not long survive and her dower estate is consequently of small value. A dower estate may be perhaps better understood if we liken it to an estate for one year. When the year passes, the estate is gone and the fee is clear thereof. An estate in dower differs from an estate inherited, because the inheritance goes to one absolutely to descend to one's heirs or be disposed of as one chooses. But an estate by dower cannot go to one's heirs because it ceases with one's life; it cannot be willed for the same reason; it cannot be sold except as one may dispose of any life estate. In some states a wife *inherits* real estate under certain conditions (as where there are no

children) and in that case the estate so inherited goes to the wife in fee, as her absolute property, to be disposed of as she sees fit, and to descend to her heirs at her death. Thus in Illinois, if a man dies without children, the wife inherits one-half his real estate; in the other half she has dower. The one-half she may convey in fee by deed; it goes to her heirs upon her death; her estate is worth what the property is worth; though she is ninety years of age she may sell the property at its market value; but her dower is in that case well nigh worthless, for it expires with her.

Dower is of *one-third* the husband's lands. It really amounts to this: that she is entitled to one-third the rents and profits of all his lands during her life; or all the rents and profits of one-third his lands.

Dower is a one-third interest in all the lands of which the husband was seized during *coverture,* that is, all the lands owned by him in fee, to which he had title, or to which he was entitled to possession during marriage. It is, therefore, the practice for a wife to release her dower in land sold by the husband, so that it passes free of this burden, that is, the possibility of her having an estate in it by surviving her husband.

Dower arises as a legal result. Therefore the wife has dower though not named in a deed to her husband. Naming her as a joint grantee would not give her dower but joint or common ownership. Therefore, she would not be named, unless she is to be indeed a co-owner.

Before the husband's death, the wife is said to have *inchoate* dower, that is possible dower in case she outlives her husband.

The essentials of dower are: marriage; seisin by husband; death of husband; survival of wife.[35]

Sec. 64. WAIVER AND BAR OF DOWER. Dower is waived by proper execution and acknowledgment according to local statutes and is barred by divorce of the wife for her fault.

The wife may release her inchoate dower in her husband's lands by joining with him in a sale thereof, and following the provisions of the statute in that regard. In some states she simply joins in the deed and the acknowledgment thereof; in some she must be taken from the presence of the husband and there questioned whether it is her free act and deed. This matter is purely statutory and the state statutes must be consulted.

The laws usually provide also that if the husband divorces the wife (she being in fault), she shall thereby lose her dower.

Sec. 65. ASSIGNMENT OF DOWER. After the husband's death the wife is entitled to have her dower set off to her, or valued and its value paid her.

The wife, after her husband's death, may have assignment of dower. She may have one-third of the land set off to her, or the value of the dower paid her. There are tables of expectancy of life, by which the value of her dower is measured.

Sec. 66. CURTESY DEFINED; ELEMENTS THEREOF. Curtesy is the estate which the husband has for life after his wife's death in all the lands whereof the wife

35. Blackstone's Commentaries, Cooley's Edition, Book II. star page 129.

was seized during coverture, provided a child was born by the marriage.

Curtesy was the life estate of a surviving husband in his wife's lands. These were the elements thereof:[36] (1) Marriage, (2) Birth of child (not necessary to dower); (3) Seisin of lands by the wife; (4) Death of wife; (5) Survival of husband.

Curtesy, like dower, is merely a life estate. By some statutes, curtesy is abolished, and a husband given an estate corresponding to that of the wife.

36. Blackstone's Commentaries, Cooley's Edition, Book II, star page 127.

CHAPTER 15.

CONVENTIONAL LIFE ESTATES.

Sec. 67. CONVENTIONAL LIFE ESTATES DEFINED AND DISCUSSED. Conventional life estates are estates created by agreement, deed or will, and are estates which may last for one's own life on the life of another.

A life estate not arising by operation of law but by act of the parties is called a conventional life estate. It may be for the life of the tenant or of some other person. A life estate for years, as, say, ninety-nine years, is not a life estate, for its duration is not measured by a lifetime.

Sec. 68. ESTATES MAY BE FOR THE TENANT'S OWN LIFE OR THE LIFE OF ANOTHER. Tenant's own life is the ordinary life estate; but it may be for the life of another.

An estate to last the lifetime of the tenant is the ordinary life estate, as where an estate is given to A for life and after A's death to B and his heirs. In this case B has the fee and A has a particular estate carved out of it. B's estate in fee is called a *remainder,* because it is the remainder of the fee after A's estate ceases.

Estates for the life of another are often referred to as estates *per auter vie.*

CHAPTER 16.

ESTATES LESS THAN FREEHOLD—LANDLORD AND TENANT.

Sec. 69. INTRODUCTORY. In this chapter we will consider the estates less than freehold, and that subject involves a consideration of the rights of landlord and tenant.

The estates which are less than freehold usually (though not necessarily) involve the relationship of landlord and tenant, as those terms are used in modern law (for in one sense the owner of any estate in land, including the fee, is a tenant). We will therefore consider some phases of the modern law of landlord and tenant.

Sec. 70. ESTATES LESS THAN FREEHOLD DESCRIBED. The estates less than freehold are those for years, from year to year, and at will or by sufferance.

An estate for years is any estate for a definite period of time as one year or ten years or ninety-nine years. An estate for less than a year if of a definite duration is, technically, an estate for years.

An estate from year to year is an estate running by periods of a year, and is terminable by either party by proper notice at the end of any year. An estate from quarter to quarter or month to month is an estate similar to an estate from year to year. These estates are called periodic tenancies, to indicate that they run by periods.

An estate at will is an estate terminable at the will of either party at any time, without any special notice.

An estate at sufferance is an estate by the mere sufferance of the landlord. It is an unusual estate and is very similar to the estate at will, except that it is technically used to indicate certain unusual situations.

Sec. 71. HOW PERIODIC TENANCIES ARE CREATED. Periodic tenancies may be created by agreement or by holding over by the tenant after an estate for years has expired.

A periodic tenancy may arise from the agreement of the parties that it shall run by periods until terminated by notice. Thus an estate from month to month often arises under an agreement that the tenancy shall be from month to month, that is, not for one month, but indefinitely by the month. But periodic tenancies also arise where the tenant having a tenancy for a certain length of time, *holds over*. In that case he holds by periods according to the period of an original letting. Thus if a tenant for a month holds over he becomes a tenant from month to month. So, if he holds for a year, by holding over, he becomes a tenant for another year, and from year to year.

It is the law that where a tenant *holds over* after his term has expired, the landlord may treat him as a tenant for another like period or may treat him as a trespasser.[87] He must, however, treat him as one or the other, and having made his election he is bound thereby and this election may be shown by act as well as by words. Thus receiving rent or in any way treat-

87. Goldsbrough v. Gable, 140 Ill. 269.

ing the hold over tenant as a tenant, shows an election upon which the landlord is bound and the tenant may then claim a tenancy for the year.

In holding over, the intent of the *tenant* is immaterial. He holds over at the risk of the landlord electing to hold him as tenant for the period ensuing, or a trespasser.

The tenancy thus created goes on upon the same terms as the former tenancy. Thus, if a tenant should hold over and should be recognized as a tenant, the landlord could not raise the rent, any more than he could have done so during the first year.

What is true in respect to holding over in tenancies for a year is true in respect to tenancies for a month.

Periodic tenancies also arise out of tenancies at will, as the tendency of such tenancies is to become periodic, as where one rents a residence for no stated time and afterwards it is by payment of rent or otherwise treated as a periodic tenancy. This would be evidence that it had become such.

Sec. 72. THE CONTRACT OF LETTING—THE WRITTEN LEASE. The letting may be oral or in writing. But oral tenancies for more than one year are not enforceable unless in writing signed by the party sought to be charged. A lease is a written document setting out the fact of the letting, and all the terms in reference thereto.

The contract of letting may be oral. If for a longer period than one year or if it shall expire more than one year from the date of the making it is within the statute of frauds, and therefore un-

enforceable unless in writing and signed by the party sought to be charged. But tenancies from year to year are enforceable without any writing.

Where the contract of letting is drawn up in regular form the writing is called a *lease*. See a form in the appendix. This lease states the rent reserved, the terms of the tenancy, etc., and is usually more favorable to the landlord than to the tenant because provided by and drawn in the interests of the landlord.

The lease, except as we have shown, is not necessary, but desirable, and its provisions constitute the contract.

Sec. 73. THE RENT. Rent is the compensation provided for the use of the premises by the tenant.

The rent is that which is agreed upon as payable by the tenant to the landlord for the use of the premises. It may be in money or produce. Farms are sometimes rented "on shares." Rent is usually stated to be an entire sum for the period, payable in monthly installments. It is usually also payable in advance by the terms of the lease. Otherwise it is not payable in advance.

Sec. 74. DEFENSES TO PAYMENT OF RENT—EVICTION BY LANDLORD. The tenant must pay the rent so long as he occupies the premises as a tenant, even though the landlord is not fulfilling his obligation. But if the tenant is forced to move because of the landlord's default, or is actually ousted from all or a part of the premises, the tenant's obligation to pay rent ceases.

The covenant of the tenant to pay rent is independent of the covenants of the landlord in respect to

the care of the premises. The tenant cannot hold back the rent for the landlord's neglect to repair, to furnish the proper amount of heat, etc., so long as the tenant continues to occupy the premises. The tenant's remedy is to make the repairs himself and charge the landlord, or, where he suffers damages attributable to the landlord, to sue for such damages.

Where the tenant is *evicted,* his obligation to pay rent ceases. Eviction is of two sorts, actual and constructive, and in either case the defense is good. Actual eviction is the actual ouster of the tenant by the landlord from the premises by force. In case the tenant is thus ousted from only a *part* of the premises, he may continue to occupy the rest without any obligation to pay rent or any part thereof. Thus if he rents a flat containing seven rooms and the landlord enters without leave and occupies one of the rooms, the tenant is under no obligation to pay rent until the landlord's occupation ceases. This is actual eviction, and might, of course, extend to the whole of the premises.

Constructive eviction exists where the landlord does an act or pursues a course of conduct which justifies the tenant in leaving the premises and on account of which he does actually leave the premises, as where the landlord is under obligation to furnish heat and fails to do so in sufficient temperature. Here the tenant may abandon the premises on the theory that the landlord has evicted him; but until he does abandon the premises, he cannot refuse to pay rent. As long as one does actually occupy premises he must pay rent, though indeed he might have counterclaims against the landlord. And in leaving the premises, the tenant must be sure that the conduct

of the landlord is such as to justify him doing so. In constructive eviction, then, there must be actual abandonment of *all* the premises.[38]

Sec. 75. DUTY OF LANDLORD IN RESPECT TO CONDITION AND CARE OF PREMISES. The landlord is under no duty to furnish the premises fit for any particular purpose; and is under no duty in respect to the care of the premises except as he may have particularly undertaken their care; but is responsible for harm from hidden defects of whose existence he knows or should know.

A tenant is presumed to have inspected the premises before he rents them, and therefore cannot complain of their condition in respect to the purposes for which he intends to use them. The landlord does not impliedly warrant them fit for any particular purpose. Of course he may especially do so. So the landlord is under no duty to give the premises any special care.

Where the landlord retains a portion of the premises as he does where he remains in control of the halls, roofs, basements, etc., of apartment houses, he must keep these in such a condition that the rented portions are habitable.

A landlord is liable for damages caused by hidden defects on account of which the tenant is injured, provided the landlord knew, or in the exercise of reasonable care, should have known, of their existence. And he is liable, as we said, to use care in the keeping of such portions of the premises as he may have kept under his control, as halls, etc., which is the case in flat buildings, office buildings and the like.

38. Boreel v. Lawton, 90 N. Y. 293.

SEC. 76. DUTY OF THE TENANT IN RESPECT TO CONDITION AND CARE OF PREMISES. The tenant is bound to return the premises in the same condition in which he received them, reasonable wear and tear and causes over which he had no control excepted.

The tenant must use a fair degree of care to keep up the condition of the premises. He need not pay for depreciation caused by reasonable "wear and tear." So, for destruction of, or injury to, the premises by the elements he is not responsible unless that is his special contract.

SEC. 77. NOTICE REQUIRED TO TERMINATE TENANCY. For tenancies of a fixed period no notice is required. For tenancies from year to year, sixty days notice is usually necessary before the end of the year. For tenancies from month to month thirty days notice is necessary. Statutory notices are also provided for termination for non-payment of rent or other defaults.

Where a lease is for a certain period as one year, no notice is necessary by either side for it terminates by its own terms. In a tenancy that runs by periods, the tenancy continues from period to period unless it terminates by sufficient notice. In tenancies from year to year at old common law, a six months' notice had to be given by tenant or landlord, but in some states this has been changed to a shorter period, such as sixty days.

Tenancies from month to month are terminable by either party, landlord or tenant, on thirty days' notice.

Periodical tenancies cannot (except upon mutual agreement) be terminated by the notices mentioned

except at the end of a period. Thus the thirty days' notice to terminate the tenancy must be thirty days before the day on which the month ends.

Besides these notices there are statutory notices for the purpose of ending any tenancy, periodic or for a certain term, at any time when the rent is unpaid when due, or any covenant unperformed by the tenant; such as five day notices. These statutory notices are for use where the tenant has been guilty of some breach, for which the landlord desires to terminate the tenancy. Such breaches may of course be waived by the landlord and when once waived, cannot afterwards be asserted. Thus, the failure to pay rent when due is a nominal breach; the landlord by afterwards receiving the rent when tendered would thereby waive the breach.

CHAPTER 17.

ESTATES IN REMAINDER AND REVERSION, AND EXECUTORY DEVISES.

Sec. 78. ESTATES IN REMAINDER; TWO SORTS. Remainders are the parts of the fee that remain out after the termination of a particular estate and are of two kinds—vested and contingent.

Where the fee is granted to begin at the end of another estate granted at the same time, the fee is said to be divided into two parts called the "particular estate" and the "remainder" of the fee. Thus, if A grants an estate to B for life and then to C and his heirs, B's estate is known as a particular estate and C's estate is known as the remainder because it terminates after the termination of the particular estate and does not come back to the grantor. If in this case A had granted to B for life, making no disposition of the fee after B's death the estate would come back to A and his heirs and A's interest would be known as the "reversion."

At common law a fee could not be granted to take effect in the future. There had to be livery of seizin. But this did not prevent the creation of remainder to begin after the termination of a particular estate because it was considered that the particular estate and the remainder together made up the fee and as the tenant of the particular estate could take the seizin at once the rule in reference to livery of seizin was satisfied. Subsequently by various devices and direct legislation to that effect the fee could be con-

veyed *in futuro,* but a division of the fee in this case is still known as a remainder.

Remainders are known as "vested" and "contingent."

Sec. 79. THE VESTED REMAINDER. A vested remainder is one, the right to enjoy which (after the termination of the particular estate) has already become certain.

A vested remainder is one which the remainderman has already acquired, though because of the particular estate, he has as yet no enjoyment thereof. Thus a grant by A to B for life and after B's death to C and his heirs, C being at that time alive, *vests* an estate in C as much as in B, though B has the present enjoyment. Yet C owns the fee and C is the one from whom title must come to any purchaser thereof. It is true C may not live to enjoy his estate. But so is it true that one who has leased his land to another for any term, however short, may die before the tenancy ends, yet he is no less the owner thereof. So in any estate of remainder, the remainderman in fee is the owner thereof though his possession may be delayed beyond his death. But remember that in all cases of vested remainders, the estate must really have *vested.* The person to take must have come into existence and there must not be any condition which may defeat title.

A remainder may vest at the time of the grant or gift, or thereafter on the happening of a contingency.

Sec. 80. THE CONTINGENT REMAINDER. A remainder is contingent when it is not certain that it will ever vest in the remainderman or his heirs.

A contingent remainder is one which may never vest. The contingency happening, it may become a vested remainder. A remainder may be contingent for a number of reasons. The remainderman named may not yet be in existence and his coming into existence is therefore a contingency on which the vesting depends, as where an estate is granted to A for life and then in fee to the unborn eldest son of A, otherwise to B and his heirs. Or it may be contingent because though the remainderman is in existence, some event may transpire to keep him from ever coming into the enjoyment thereof, as where a particular estate is granted to B and then over to C in the event that he has a son.

Sec. 81. THE PARTICULAR ESTATE. A particular estate is necessary to the creation of a remainder, and in contingent remainders must be a freehold estate.

To have a remainder there must be a particular estate upon which the remainder is supported and the remainder must begin immediately upon the termination of the particular estate. Thus, a grant by A to B is a mere conveyance of the fee in its entirety, and there is no outstanding remainder. So a grant from A to B to begin *in futuro* is a mere conveyance of a future estate and no remainder (a future conveyance of the fee was not possible at common law). To support a contingent remainder a particular estate of freehold was necessary.

Sec. 82. OF THE VESTING OF REMAINDERS. The law favors the vesting of estates, and a remainder will vest as soon as possible. Where the remainder is to a class, the estate vests in the members of the

class as they come into being subject to being opened up for subsequent members.

It is the policy of the law that estates should vest at the earliest possible moment. For this reason where there is any doubt as to whether a remainder is contingent or vested, the court will construe it as a vested remainder. For this reason also an estate will be considered as having vested at the earliest possible moment. Where the gift is to a class none of the members of which are yet in existence, but who come into existence during the life of the particular estate, the remainder will vest in each member as he comes into being subject to being opened up for possible future members.

Sec. 83. THE RULE AGAINST PERPETUITIES. The rule against perpetuities is a rule which forbids the postponement of the vesting of an estate beyond a certain period. Estates must vest during a life or lives in being or twenty-one years thereafter.

The law forbids the tying up of an estate by remote contingencies whereby it may vest upon their event. The policy of the law in this respect is expressed in what is termed the "rule against perpetuities." This rule has no application to *vested* estates. Thus a gift to A of an estate which is subject to a lease for 999 years would be good and the rule against perpetuities would not apply to it. The rule is, that if a grant is made to take effect upon a *contingency* the gift is void unless the contingency *must* occur and the estate thereby *vest* either during the life of the tenant, or lives of the tenants, named, or within twenty-one years after his or their death. This permits a gift to an unborn son of the living tenant to take effect on his 21st birthday.

Sec. 84. ESTATES IN REVERSION. Where an estate less than the fee is created, the fee, subject to this estate remains in the grantor or testator, his heirs or assigns, and is an interest known as the reversion.

By the term reversion we indicate the title which one has in property when he has granted an estate to another which is less than the fee and has not disposed of that fee by way of remainder. Thus, if A owns land in fee and rents it for ninety-nine years to B, the reversion is said to be in A who is the owner of the fee after the ninety-nine years have elapsed. He may sell this reversion or dispose of it as he will but it must pass of course subject to the rights of the tenant.

Sec. 85. EXECUTORY DEVISES. An executory devise is a gift of real estate by will to take effect on a future contingency without the intervention of a particular estate.

An executory devise is, as the name implies, a gift of real estate by will, to take effect upon some future contingency, as where "one devises land to a *femme sole* and her heirs upon her day of marriage;[39] an executory devise needs no particular estate to support it, as in the illustration given, and at common law the same gift by deed would have been void as a conveyance of the fee *in futuro*. But by executory devise this was permitted.

It was also said that one by executory devise could "limit a fee upon a fee" which was not permissible by deed as "if a man devises land to A and his heirs; but if he dies before the age of twenty-one, then to B and his heirs."

The executory devise is void if it is contrary to the rule against perpetuities.

39. Blackstone's Commentaries, Cooley's Edition, Book II, star page 273.

CHAPTER 18.

SEVERAL AND JOINT OWNERSHIP OF ESTATES.

Sec. 86. INTRODUCTORY. Titles may be held jointly by a number of persons or by one person in severalty.

We have been considering how an estate may be in fee or for life or for a term of years, etc., without respect to the person who may own it. We now see that any of these estates may be owned by one person or by several together. Where several own together there are technical distinctions to be made.

Sec. 87. THE ESTATE IN SEVERALTY. An estate in severalty is an estate owned by one person to the exclusion of all others.

Where the title is in one person he is said to own in severalty. Thus, if A owns a life estate or a term of years or a fee, he owns in severalty. This simply means he is a sole owner but does not exclude the idea that he may have created a lesser estate; for instance, owning in fee, he may lease for a term. Here he would be owner in severalty subject to a tenancy.

Sec. 88. TENANCIES IN COMMON. An estate is held in common when there is an undivided ownership by several persons who hold by several and distinct titles.

The ordinary case of plurality of ownership in modern days, is that of tenancy in common. A ten-

ancy in common is a tenancy by several who hold distinct titles to the whole estate, their interests being undivided, as where A, B, C, and D, children of X, deceased, inherit his land. Here each owns the *entire* estate in common with the others. So if two parties purchase property jointly taking a title in the name of both, they are owners in common.

Where land is held in common, each of the tenants in common may have a partition when he so desires (provided of course there is no express restriction of that right in the particular case), that is to say, any tenant in common may demand a division of the estate according to his interest and if this is refused the court will make this division upon suit being filed to that end. Where the land is of such a nature that it cannot be partitioned without manifest injury to the property or the interest of the tenants it will be ordered sold and the proceeds divided.

Tenants in common need not hold in equal interest. Thus one tenant might have one-half interest and two others each a one-fourth interest. So one may hold by descent, another by deed, another by will, etc. A tenant in common may sell his interest or dispose of it in any way he sees fit and his successor has the same rights in the land that he had. Upon the death of a tenant in common his interest passes to his heirs or to his devisees. In this it differs from an interest by joint tenancy, which on the death of the tenant passes to his survivor.

Sec. 89. JOINT TENANCIES. A joint tenancy is a tenancy held by two or more by the same title in the same interest.

A joint tenancy was a common law estate where several persons came by grant or devise (deed or will) into an ownership of the same estate. Thus, if A granted to B and C for life or in fee, B and C were joint tenants. A joint tenant could not compel a division and when he died his interest passed to his survivor. Joint tenancies are now generally abolished, except where expressly created, and except in cases of trustees and the like, where survivorship of title is desirable. The language which would have once created a joint estate now creates an estate in common.

Sec. 90. ESTATES IN CO-PARCENARY. An estate in co-parcenary exists where several persons hold as one heir.

An estate in co-parcenary was an old common law estate existing where several took the same land by inheritance. Thus there being no eldest son, the daughters inherited in co-parcenary, and also by the custom of gavel kind in Kent, all the sons inherited together. To-day such parties hold in common.

Sec. 91. ESTATES IN ENTIRETY. Estates in entirety were estates held by husband and wife.

Where an estate was given to a husband and wife, the title was known as a title in entirety, as they held as one person. This estate has become unknown in our modern law and now husband and wife hold either as tenants in common or joint tenants. Of course, either the husband or wife may own property in severalty subject to the dower of the other one.

CHAPTER 19.

ESTATES OWNED LEGALLY OR EQUITABLY—USES AND TRUSTS.

Sec. 92. IN GENERAL. The law permits one person to hold legal title to property upon obligations to use it in declared ways for the benefit of another, that is, one may have the legal title, while another has a beneficial estate therein.

In our law, it is possible to clothe one with legal title, upon declared uses or trusts for the benefit of another; the legal ownership is in one and an equitable ownership or claim in another. Thus we may have A granting the fee to B subject however to a provision that B shall use the land for C's benefit and even to convey it to C after a certain period. We speak of obligations of this sort as uses and trusts. There are a variety of reasons why an estate might be granted in this way: to keep it intact for a period instead of being divided among several; to give the legal title into capable hands, the beneficiary being a spendthrift or inexperienced; to perpetuate certain purposes, etc. Uses and trusts may also arise by operation of the law.

The owner of the legal title is called the trustee, the person for whose benefit he holds it is called a beneficiary or a *cestui que trust.*

Sec. 93. A USE DEFINED. A use may be defined as a right to the benefits and profits of land the legal title to which (or in early days the seizin of which) was in another.[40]

40. Generally, for historical discussion see Blackstone's Commentaries, Book II, star page, 327, ff. Cooley's Ed.

The term "use" was once of more importance than now, as we shall see. We now generally use the term "trust." A use was a right in one to the benefits of land of which another had the title.

The idea of a use was probably taken from the German law, and was originally applied in England to give the benefit and profits of land to a religious order forbidden by law to hold real property. Thus if A desired to convey to a church and the church was forbidden to hold real property, A would convey to B "to the use" of the church, setting out the uses. Courts of equity took jurisdiction of uses and enforced them. The law which forbade the ownership of lands by the church was called the "Statute of Mortmain," to prevent excessive holdings "in dead hand," and this statute was evaded by the adoption of the use and its recognition by courts of equity. Other purposes of the use were soon found, and it was created to unjustly evade the liabilities and burdens incident to ownership.

Sec. 94. THE STATUTE OF USES. The statute of uses was a statute passed to prevent holding land upon use, by putting the legal title in the beneficiary. The courts decided that certain uses were not covered by the statute and these survived under the name of trusts.

Owing to the evils possible under the device of the use, Parliament in 1535, passed the "Statute of Uses." It provided that whenever a person should be seized to uses, the person having the use should by operation of law be deemed to have the seizin or legal title.

The courts decided that the statute did not execute:

(1) A use upon a use.

(2) Uses in personal property.

(3) Active uses.

To distinguish what uses it did not execute, the court called them "trusts."

First, as to a use upon a use. Here A conveys to B to the use of C to the use of D. The courts of law declared the title in C by virtue of the statute and the use to D void, as there could be no use upon a use; but courts of equity enforced the use to D as a trust. Thus C would hold to the use of or in trust for D, notwithstanding the statute. Thus by a few words the court permitted the evasion of the statute, and the very condition existed which the statute was enacted to prevent.

Second, uses in chattels. Uses in chattels were not covered by the statute. Such uses were known as trusts.

Third, active uses. An active use is one in which the feofee to uses has active duties to perform as where he must collect rents, or perform services of any sort. Other uses were known as *passive* or *dry* uses in which the feofee to use held the bare naked title with no duty to perform except when demanded or at a certain period to convey the fee to the beneficiary.

Sec. 95. CONVEYANCES UNDER THE STATUTE OF USES. The statute of uses was availed of by the conveyancers to transfer the title without livery of seizin.

We have elsewhere noticed that in transfers of the fee there must be "livery of seizin" at common law. Under the Statute of Uses, a number of forms of conveyance were invented which did away with this necessity and also permitted the transfer of the fee *in futuro*. This was accomplished by creating such a use as the statute would execute. Thus A desiring to convey the fee to B *covenanted to stand seized* to B's use. The statute of uses thereupon operated to give B the seizin and B without more ado became vested with the seizin and the ownership. This was the "covenant to stand seized," but it afterwards fell into disuse in favor of the "lease and release" and the "bargain and sale." These are hereafter more discussed. Thus conveyancers made use of the Statute of Uses in ways not contemplated by the enacters, and by its aid the fee could be granted without livery of seizin.

Sec. 96. TRUSTS DEFINED AND TABULATED. A trust may be defined as an obligation upon the legal owner of land to hold or use it for the benefit of another upon uses not executed by the statute of uses; or it may be used as synonymous with the term use.

From our discussion of a use, we understand already what we mean by the term trust which is the modern term and indicates a common situation.

Trusts may be tabulated as follows:

(1) Express trusts.
   1. Active trusts.
   2. Passive or dry trusts (either so in their creation or by performance).

(2) Implied trusts (or trusts that arise by operation of law.
   1. Constructive trusts.
   2. Resulting trusts.

An express trust is one created by the language of a deed, will or other instruments. If there are active duties to perform, as to manage the property, collect rents, etc., it is called an active trust. A passive trust is one in which the trustee has nothing to do except convey the legal title to the beneficiary. If so in its inception, it is properly a use and not a trust, and the statute of use immediately by operation of law executes the legal title in the beneficiary. Or it may become passive because all the duties thereunder have been performed, except the conveyance of the legal title.

Implied trusts are such as arise by operation of law in order to give the real ownership to one who in equity ought to have it instead of the nominal holder of the title.

Sec. 97. THE CREATION AND EVIDENCE OF THE TRUST. The trust may be created by deed, will, or contract, and if in real property cannot be enforced unless declared in writing by the party legally capable of declaring it; except resulting and constructive trusts.

Trusts may be created by almost any form of declaration. They are perhaps most frequently declared in wills. They may be declared by deed or any form of agreement.

Trusts in real property must be *declared* in writing, except constructive and resulting trusts. They need not be *created* in writing so long as a declaration follows. In that case the trust will be enforced from the time created. The form of declaration is immaterial so long as sufficient in substance. It may be found in letters, pleadings, in litigated cases, etc.

Usually of course, it is declared when created, as in wills, deeds, and the like.

The declaration must be by the one who can impress a trust upon the property, that is, the owner. Thus A conveys to B declaring the trusts. Or he conveys to B on trust but omitting the written declaration, depending on B's integrity. Now B is the only one who may declare the trust.

The declaration must be signed.

In every trust there must be certainty. The property affected must be certain, the person to be benefited must be certain, the use must be certain, though a discretion in the trustee is permissible; and there must be a trustee named or described and capable of identification.

Trusts cannot be created to offend the rule against perpetuities. The trust cannot be a perpetual one There must be a vesting of the estate within the time provided in that rule. This, however, does not apply to *charitable* trusts, which may be perpetual.

Sec. 98. PRECATORY TRUSTS. A precatory trust is a trust inferred from the use of words of hope, confidence and the like.

A precatory trust is sometimes said to be an implied trust, but it is really an express trust, because it is expressed in the words used, though not directly and clearly. Thus suppose A leaves property by will to B "having full trust and confidence" that B will devote to certain uses for C's benefit. Has it been conveyed upon trust in the sense that B *must* perform the trust, or is that a matter left to his own discretion or sense of right? The rule is that where words of hope, desire, confidence, etc., are used in this way there must really be an intent manifest from all the instrument to create a positive trust. The

language though consisting in pleading or prayerful words, must be mandatory, and it must contain all of the elements of a trust, as certainty of party, certainty of property affected, certainty of purpose, etc.

Sec. 99. CHARITABLE TRUSTS. A charitable trust is a trust for the benefit of the public at large or of some class of persons of the public.

A charitable trust is also called a public trust. It is a gift made in a charitable purpose to the public, or to some class of the public, as a gift to maintain a home for crippled children, to found a hospital, to endow a chair in a college not conducted for private profit, etc.[41] A charitable trust differs from a private trust in perhaps three ways:

(1). The objects of the trust must be members of a class. The gift cannot be for the benefit of John, Henry or William (for then it would be a private trust), but for the benefit of a class in which John, Henry and William are to be found.

(2). The rule against perpetuities does not apply. A charitable trust may be in perpetuity.

(3). A doctrine called the *cy pres* doctrine applies. By this doctrine the court will not allow a charitable trust to fail because it is incapable of literal execution. If the particular object fails, the court looks to find the general intent of the donor, and then applies the trust as nearly as may be to the object of the donor.

In other ways a court treats a charitable trust in a different fashion from a private one. Such

41. By the statute, 43 Eliz., c. 4, various purposes of charitable trusts were enumerated. This statute is usually regarded as illustrative and not exhaustive.

trusts are encouraged and favored by the law. So, if a trustee has not been named in a charitable trust the court will appoint one.

It has been held that a gift to maintain a drinking fountain for horses is a charity. But trusts to maintain a private burial lot are not charitable, and therefore must not be made in perpetuity.

Sec. 100. THE TRUSTEE, HIS TITLE, DUTY, ETC. The trustee has the legal title, and must perform the trust, in its letter and spirit, and manage the estate in a prudent and profitable manner. He must look first to the safety of the investments made by him and secondly to the income.

A person named as trustee need not accept the trust. In case he does not desire to accept, he should for his own protection make an immediate and unequivocal rejection. But if he undertakes to act, he must act as a prudent man. He is not protected in merely acting in good faith. He must not undertake the trust if he is incapable of performing it with prudence. He must make repairs, keep up insurance, etc., and do all things that a prudent man would do in managing his own property. Where the trust consists in funds to be invested, the first requisite is safety of investment. To this end the courts have said that a trustee must invest in such securities as first mortgages on real estate, government bonds, etc. Some statutes make an extension of this and allow a trustee to invest in municipal bonds, corporation bonds, etc., where a reasonably prudent man would regard them as safe. Of course, if the trust directs the investment *in a particular way* the trustee must act in that way.

The profit from the trust fund is of second consideration. That must be made as large as possible *compatible with safety of the investment.*

Sec. 101. SPENDTHRIFT TRUSTS. A spendthrift trust is a trust which provides that the beneficiary cannot by assignment or otherwise impair the trust fund or income and that creditors shall have no recourse to the fund or income. If of public record it is in most jurisdictions upheld as valid.

A spendthrift trust, as above described, is for the purpose of preventing waste of the funds or income by an irresponsible beneficiary. In most jurisdictions it is regarded as valid,[42] largely on the theory that creditors take a risk when dealing with a person in such a situation. After the beneficiary actually gets his income, then it loses its character as a trust fund and creditors may attack it or the beneficiary may spend it as he chooses.

One cannot convey his own property to a trustee upon a spendthrift trust in his *own* favor. He cannot thus place his own property beyond the reach of his creditors.

Sec. 102. IMPLIED TRUSTS. Implied trusts are trusts raised by the law on account of the equities of the circumstances. They are of two sorts; resulting and constructive.

Where one is in the ownership of property which from the circumstances evidently belongs to another title the law raises a trust so that the legal title may be made to come to him who is the real owner. There are two sorts—resulting and constructive.

42. **Wagner v. Wagner, 244 Ill. 101.**

Sec. 103. RESULTING TRUSTS. A resulting trust is one which arises under circumstances from which it appears that one who becomes clothed with the legal title was not meant by the parties to have the beneficial title thereto though no trust has been declared.

We will find that constructive trusts are trusts which arise largely out of circumstances which are fraudulent or in the law amount to fraud. A resulting trust is one in which the parties have entered into some transaction by which one becomes clothed with the legal title but it is evident from the circumstances that he is not to have the beneficial title. One class of cases is that in which purchase money is paid by one person and the title taken in the name of another.[43] Here the law presumes a trust unless it affirmatively appears that a gift was intended. Another class of cases is that in which a trust is made upon purposes which thereafter fail or upon purposes which are to be announced later but are not announced.[44] There are also some other classes of cases but these are the chief ones in which a trust results.

Sec. 104. CONSTRUCTIVE TRUSTS. A constructive trust arises where there is fraud or inequitable conduct by which one comes into the legal ownership of property which he does not otherwise possess.

Where one acquires a title through fraudulent conduct or through inequitable conduct, the court may impress the title with a trust in favor of the real owner or person who ought to be the real owner.

43. **Trapnall v. Brown, 19 Ark. 39.**
44. ***Id.***

The circumstances are multitudinous. Thus, where property is about to be conveyed in trust and a third person induces the donor not to name the trust but convey to him and he will perform the trust, as where A being about to make a will in B's favor is induced by C to convey to him upon his representation that he will convey to B.

So where an agent takes title in his own name; so where trust funds are used by the trustee for investments of his own. In these and many other cases the court impresses the property with a trust.

CHAPTER 20.

ABSOLUTE AND CONDITIONAL ESTATES.

Sec. 105. IN GENERAL. Estates may be held in absolute title, or upon a condition that may defeat them.

One may convey an estate absolutely or upon condition. A condition may be *precedent,* keeping an estate from vesting, or, it may be a condition *subsequent* which defeats a vested estate. A condition precedent is one which prevents any ownership accruing at all, as where an estate is to pass to one provided she marries. Thus, all contingent remainders are estates depending on conditions that may prevent them from ever vesting.

We shall notice an estate upon condition in the case of a mortgage which of old (and even now in form), was an estate subject to defeat by the payment of the mortgage debt, but by failure thereof, passing into an absolute estate.

So we shall notice other estates upon conditions as to the *use of the land.*

CHAPTER 21.

ESTATES IN MORTGAGE.

A. The Nature and History of the Mortgage.

Sec. 106. MORTGAGE DEFINED. EARLY VIEW. A mortgage may be defined as a conveyance subject to defeasance by the performance of a condition subsequent.

A mortgage was a pledge for the performance of some obligation, usually the payment of a debt. It was, in form and effect, a conveyance upon a condition that if the obligation were performed by a certain day, title would revert to the mortgagor. The effect of this deed at common law was to make the estate absolute after the breach of the condition. The day upon which performance was to be made was called the "law day" because it was the day on which in the courts of common law the condition must be performed to prevent the title from becoming absolute.

This view of the mortgage whereby the mortgagee secured the entire estate after the law day was a harsh one, and courts of equity came to establish a relief. A court of equity looks beyond the form and into the substance of any transaction and it is readily seen that the substance of a mortgage is in reality the creation of a debt, and not a conveyance of property. The court of equity therefore allowed a mortgagor to file a bill for redemption after the law day had passed and the condition was broken. In this way the mortgagor could secure his estate by paying the debt with accrued costs and interest.

This right of the mortgagor was called his equity of redemption and was a cloud on the mortgagee's title so that he was forced to go into a court of equity and ask foreclosure of the right of redemption before he had a perfect title. In this foreclosure proceeding the mortgagor was given a certain time in which to redeem or be forever barred. This was "strict foreclosure" and resulted, even in the court of equity, in giving the mortgagee the entire estate regardless of its excess value over the debt unless the mortgagor redeemed within the time due.

Sec. 107. MODERN VIEWS OF A MORTGAGE. The modern view of a mortgage is that it is a conveyance in security for a debt, the debt being the main thing and the mortgage merely incidental thereto.

In modern days we regard the mortgage as a lien though in form it is still a conditional conveyance conveying the fee, but for practical purposes it is merely a lien by which one secures payment of his debt and no more. The debt is regarded as the main thing and the conveyance a mere shadow thereof without existence apart from the debt.[45] When foreclosure is had, the mortgagor is not barred but a public sale is conducted and the debt paid out of the proceeds, the surplus being rendered to the mortgagor after deduction of the proper expenses incidental to the sale. Where the mortgagee is still regarded as having legal title, he has it only for the limited purpose of his security.

B. The Creation of the Mortgage.

Sec. 108. THE FORM OF A MORTGAGE DEED. The deed or mortgage is in form a conditional conveyance of the fee.

45. Lightcap v. Bradley, 186 Ill. 510.

By reference to the form in the appendix the modern form of a mortgage deed may be seen. The fee is conveyed upon a condition.

Sec. 109. TRUST DEEDS. The trust deed is a form of mortgage in which a trustee is appointed and it has some advantages over the other form.

A trust deed is set out in the appendix and should be studied. It is in reality for all purposes merely a mortgage. A trustee is appointed who holds the property in trust subject to the terms of the deed. In some states this trustee is given a power of sale and he is the person who releases to the mortgagor when the deed is paid. A trust deed is for many purposes preferable. One reason is that a trust company of reliability may be appointed trustee and thus is excluded the danger of change of trustee by death; another reason is that the debt may be more easily transferred, the notes being simply indorsed in blank by the debtor and circulated among succeeding purchasers of the debt while in the case of a mortgage, an assignment thereof would be desirable.

Sec. 110. THE EVIDENCE OF THE DEBT. The evidence of the debt is usually in the shape of promissory notes of a negotiable character.

When a mortgage is made there are two instruments to be executed; first, the mortgage or trust deed itself; and secondly, the notes which express the indebtedness. There may be one note or there may be a series of notes and the note may have interest coupons attached or simply bear interest. It is often preferable to make the note payable to one's self and then indorsed in blank.

Sec. 111. EQUITABLE AND CONSTRUCTIVE MORTGAGES. Where the transaction is in reality a mortgage a court of equity will so construe it and enforce it even though its character is not apparent upon its face.

Applying the maxim that a court of equity looks beyond the form and into the substance of a transaction, a court will enforce a transaction as a mortgage where it was the intent of the parties that a mortgage would exist though the form of the transaction seems to indicate an absolute deed or other transaction. Thus if one borrows money and to secure the mortgage makes a deed to the lender upon an oral agreement that the lender will re-convey when the debt is paid, this is in reality a mortgage, though it does not so appear upon the face of the instrument, and if the grantor in the deed can show that the transaction was really a mortgage the court will give him redemption of the property.

C. Provisions in Mortgage Deeds.

Sec. 112. THE POWER OF SALE IN MORTGAGES AND TRUST DEEDS. The mortgage or trust deed usually contains a power of sale whereby the mortgagee or trustee can foreclose the mortgage except in some states where mortgages must be foreclosed in the courts.

If the law permits, the mortgage or trust deed contains a power of sale by virtue of which the mortgagee can foreclose the mortgage without going into court, by simply having a public sale, paying the debt out of the proceeds and rendering the surplus to the debtor.

In some states it is provided by the law that all mortgages of real estate must be foreclosed by a judicial proceeding and in such a case a power of sale would of course be nugatory. Consequently, in these states no power of sale is contained in the forms used.

Sec. 113. ATTEMPTED WAIVER OF THE RIGHT OF REDEMPTION. The right of redemption cannot be waived by the parties to the contract.

As soon as the court came to the assistance of the mortgagee to give him redemption after the law day, the attempt was made by lenders to secure back the advantage thus taken away. By express contract it may be provided that there should be no right of redemption, but the courts have held that if a transaction is a mortgage then the incidents of a mortgage will exist irrespective of the agreement of the parties. The phrase in this connection has often been used "once a mortgage, always a mortgage" and this means that once the court has decided the transaction is a mortgage it will treat it as such for all purposes and the parties cannot deprive the mortgage of its nature by the addition of a few words. Since borrowers will in their necessities, often consent to anything, the lender could get back the old harsh remedy of forfeiture for nonpayment.

Sec. 114. RECORDING LAWS CONCERNING MORTGAGES AND TRUST DEEDS. Recording laws are in effect in all states by which the creditor can perfect his lien against all the world by making proper record of the mortgage or trust deed.

Between the parties the mortgage is good without record and it is also good as to third parties who

have notice, but it is the desire of one who has notes secured by mortgage to know that his security is good against the whole world. This he may accomplish by recording the mortgage in the place where the real estate is situated. Every party thereafter who desires to deal in respect to that real estate or acquire any rights against it must take notice of what the record is, which as a matter of fact, he may secure by examining an abstract brought down to date. Thus, if a mortgage is properly put on record, subsequent judgment creditors of the mortgagor take a secondary lien; the subsequent mortgagees of the same property likewise take an older lien, and purchasers of the land take subject to the mortgage.

Sec. 115. POSSESSION BY MORTGAGEE. If a mortgagee takes possession, this gives notice to all the world of whatever rights he may have.

It is customary to always record a mortgage whether the mortgagor remains in possession, which he usually does, or whether the mortgagee goes into possession. But it is still the law, if the mortgagee does take possession, this possession is a notice to everybody that he has rights in the property and will protect him against subsequent purchasers and encumbrancers.

D. Incidents of a Mortgage.

Sec. 116. RIGHT OF POSSESSION. The right of possession is in the mortgagor unless agreed otherwise though by the common law it was in the mortgagee.

Who shall have the right of possession depends upon the contract of the parties but if there is no express provision in the contract the mortgagor has

the right of possession until breach occurs on his part. By the common law the mortgagee had a right of possession but now in most of the states the mortgagor has this right and cannot be deprived of it at least until breach.

Sec. 117. DUTIES OF THE PARTIES. The duty of the mortgagor is not to impair the value of the property. The duty of the mortgagee in possession is to treat the property as a prudent owner.

The general duty of the mortgagor is not to decrease the value of the security by pulling down buildings or other acts of destruction, though he can hardly be said to have any duty to keep the place at its original value. When a mortgagee goes into possession he must give that care to the land that a prudent owner would give. He must see that it is insured, that taxes are paid, etc., though he may add expenses of this sort to the debt. He also must allow a reasonable rental for the value of the premises while in his possession to go to reduce the debt, and whatever rents and profits there may be from the land he is not entitled to except in payment of the debt.

E. Sale of the Mortgaged Property and Transfer of the Debt.

Sec. 118. SALE SUBJECT TO DEBT. A sale of premises by the mortgagor cannot deprive the mortgagee of his lien if the mortgage is properly recorded, but as between the mortgagor and the buyer, the buyer may or may not assume the debt as a part of the consideration.

We have seen that if the mortgagee properly protects himself, his lien is good against the whole

world and that if the mortgagor sells the property the buyer must take subject to the lien of the mortgage.

Where land which is sold is subject to a mortgage the mortgage is generally assumed by the buyer, for this is the best way he can protect himself, because otherwise he must rely upon the financial ability of the mortgagor to pay the debt when due, and the buyer in that case runs the risk of having to pay the debt twice, once to the mortgagor and then to the mortgagee to prevent foreclosure. Accordingly it is the usual rule for the buyer to assume the payment of the mortgage paying the difference in value to the mortgagor. Thus, if land worth ten thousand dollars is mortgaged for five thousand a buyer pays five thousand and assumes the debt. In such a case he is said to be buying the "equity," though he is in reality buying the legal title subject to the mortgage.

Where the buyer assumes the payment of the debt he becomes the principal debtor and the original mortgagor becomes the surety. In such a case, both mortgagor and purchaser can be held liable for a deficiency of the security upon foreclosure.

Sec. 119. TRANSFER OF THE DEBT. The mortgagee may transfer the debt and in that case the security is also transferred as an incident thereto.

Just as the mortgagor may sell the land subject to the debt, so the mortgagee or holder of the trust deed notes may transfer the debt. As the mortgage is an incident of the debt and has no existence apart from it, the right to the mortgage cannot be assigned

independently of the debt and always passes as an incident of the debt.

The usual manner of assigning the debt is as follows: If the mortgage is in the mortgage form the notes are transferred and the mortgage assigned usually by a separate deed of assignment. If the mortgage is in the form of a trust deed the notes are simply transferred. Very often the notes are made payable to the order of the maker and then indorsed by him in blank, and in that event may be transferred by the mere delivery of the notes. This makes the transfer of the debt very simple.

F. The Remedies of the Mortgagee.

Sec. 120. INJUNCTION TO PREVENT WASTE. The mortgagee may have an injunction to prevent waste by a mortgagor in possession.

Where a mortgagor is in possession of the property we have seen that it is his duty not to commit waste and he may be prevented by an injunction.

Sec. 121. EJECTMENT OF THE MORTGAGOR. The mortgagee could at common law eject the mortgagor and take possession, but in the United States the mortgagor's right to ejection depends upon the right of possession, and we have seen that the mortgagor has the right of possession until condition broken and in some states has it at all events except upon a contract to the contrary.

Where the mortgagee does eject the mortgagor he does it merely for the purpose of satisfying the debt and when the debt is gone the mortgagee has a right to the premises again. Ejectment in such cases is not common as the mortgagee resorts to foreclosure.

Sec. 122. SUIT ON THE DEBT. The mortgagee may sue upon the notes or upon the debt in whatever form it is.

A mortgagee has a claim which is secured by mortgage. He need not resort to the mortgage for his remedy but may have a judgment in a common law court upon the debt and by virtue of his judgment can take out execution on the property of the debtor, but not the property included in the mortgage, for this would give him foreclosure in a manner not contemplated by law.

Sec. 123. FORECLOSURE. The ordinary remedy of a mortgagee is that of foreclosure.

At common law this meant the barring of the mortgagor's equity of redemption and under modern statutes means the sale of the property through judicial proceedings or at a non-judicial sale, in states where that is allowed, for the purpose of satisfying the debt and paying a mortgagor the surplus. Where a mortgagor fails to pay the debt when it is due and the mortgagee finds that he must pursue some remedy to obtain satisfaction the usual remedy is that of making use of his security and is done by means of foreclosure.

In the event that he does not thus secure satisfaction of his debt, the mortgagor still owes him the balance.

By statute a mortgagee may have in a foreclosure proceeding a "deficiency decree."

Sec. 124. KINDS OF FORECLOSURE. At common law foreclosure was by judicial proceeding to bar the equity of redemption. Under the modern practice it is either by judicial proceeding to sell the property

and pay the debt out of the proceeds or to sell at a non-judicial sale under a power of sale in the mortgage.

(1) *Foreclosure at Common Law.* Foreclosure in early days as we have already indicated meant the taking of the estate mortgaged through a judicial proceeding whereby the equity of redemption was cut off after giving the mortgagor a certain time within which to redeem. By this method the mortgagor was given a chance to get his estate back but upon failure to comply with the terms of the decree the mortgagee obtained the property as his own though it might have been of a value largely in excess of the debt.

(2) *Under Power of Sale in Modern Practice.* It is the practice in some states to put in a mortgage or trust deed a power of sale whereby the mortgagee or trustee is given the authority to sell the property at public or private sale and pay the debt from the proceeds, rendering the surplus to the mortgagor after payment of costs and accrued interest. In almost every state the old common law remedy of strict foreclosure is abolished.

(3) *Foreclosure Through Judicial Proceedings Under Modern Practice.* Where there is no power of sale in the mortgage the foreclosure must be through judicial proceedings and in some states powers of sale are not legal and in that case it must be foreclosed in the courts. The courts of equity foreclose a mortgage these days by ordering a sale of the property by a master in chancery or other judicial officer at which the best amount obtainable is secured by auction, out of the proceeds of which the mortgagee is paid his debt and expenses and the surplus then

turned over to the mortgagor. Strict foreclosure as it existed in early times whereby the estate itself was taken is not now permitted as a general rule and never permitted where the security is of more value than the debt. From this sale the mortgagor has a certain time to make a redemption and this we consider in the next section.

G. The Remedies of the Mortgagor.

Sec. 125. REDEMPTION FROM THE MORTGAGE. The mortgagor may redeem from the mortgage by applying to a court of equity offering to pay the debt with accrued interest and costs.

We have already seen how after the law day had passed the mortgagor was permitted by the courts of equity to get back his estate notwithstanding his breach of the condition, by paying the debt. This was called redemption and the mortgagor's right was known as his "equity of redemption." Ordinarily it is not necessary in these days for a mortgagor to apply to a court of equity for this remedy for the simple reason that if he can pay the debt the mortgagee is willing to receive it and to release the title without any court intervention. If, however, the mortgagee is unwilling to accord the mortgagor his rights then the mortgagor has the remedy named. A bill for redemption is accordingly brought where there is no bill for foreclosure. This is the way also that a mortgagor proceeds when he has given an absolute deed which he now claims to have been by way of mortgage.

This right of redemption from the mortgage must be strictly distinguished from the right of redemption from a sale in the foreclosure proceeding given

by statute and which we consider in the next section.

Sec. 126. REDEMPTION FROM SALE. Where the mortgagee forecloses by means of a judicial or non-judicial sale the mortgagor has the right of redeeming his property from the sale for a certain period of time by paying the debt with a rate of interest provided by law and perhaps a certain penalty.

There is a right of redemption given by the statute where there has been foreclosure. This redemption is entirely distinct from the one named in the last section because that is resorted to when the mortgagee will not recognize the mortgagor's equity of redemption. The redemption we now notice is a statutory one provided in cases of foreclosure whereby after the sale the mortgagor has a certain length of time in which to pay the debt and get back his property from the purchaser at the sale. Thus, suppose that A, mortgagee, forecloses against B, mortgagor, and C purchases at a sale decreed by the court. The sale brings three thousand dollars more than the debt and all costs, accrued interest, etc. This surplus is turned over to B. Now C obtains a certificate showing that he has purchased the property and that in course of time he will be entitled to a deed if B does not redeem. The statute, however, gives B twelve months, say, in which to redeem from the sale and B can avail himself of this right and thereby secure back his estate by paying to C all that C has paid out with interest thereupon.

H. Junior Mortgages.

Sec. 127. RIGHTS OF SUBSEQUENT MORTGAGEES. Assuming that a mortgagee has protected

his security by record or otherwise, subsequent mortgagees take a lien which is subject to the first mortgage, each in order of time.

Sometimes second mortgages are given upon land. This is really a mortgaging of the equity of redemption and those subsequent mortgages cannot in any way affect the rights of the first mortgagee, assuming that the first mortgagee properly protects himself by record or taking possession. To illustrate the effect of a second mortgage, let us assume that A has mortgaged his property, worth ten thousand dollars, to B for five thousand dollars. Here A has an equity worth five thousand dollars. A then again mortgages the property to C for two thousand dollars. Suppose now that B forecloses. The property is sold without any lien upon it on account of C's mortgage, because otherwise A could prejudice B's rights by subsequently putting a lien upon the property in favor of C and at a sale the property would have to be sold subject to C's lien which would mean that less cash would be offered for it. What, then, are C's rights? They are practically to pay the first mortgage when it is due (if A will not do so) and step into B's place, having in that case a lien upon A's property for $7,000.00; or C may redeem in A's place for he is subrogated to this right. A junior mortgagee then has his protection in being able to take care of the first mortgage if the mortgagor does not do so, the security being ample to cover both mortgages.

PART V.

RIGHTS IN THE LAND OF ANOTHER.

CHAPTER 22.

RIGHTS WHICH ONE MAY HAVE IN THE LAND OF ANOTHER.

Sec. 128. IN GENERAL. One who has no possession of or title in certain land may have certain interests therein in reference to its use.

We have been considering the estates which one may have in the land of another. Now we are to consider the rights which one may have in reference to another's lands when he has no estate therein and no possession thereof although it may happen that to enjoy his right he must at times go upon this land. The chief cases of this sort of right come under the name of "easements," another sort are described by the name of "profits" or "commons." There are certain rights of this general nature also which we will delay the discussion of until we come to the subject of deeds, which arise from covenants and conditions in deeds. There were also certain old rights in land which we need to but mention because they are obsolete, among which are "tithes," etc., discussed under the subject of "Incorporeal Hereditaments," *infra*.

CHAPTER 23.

EASEMENTS AND PROFITS.

Sec. 129. EASEMENTS DEFINED. An easement may be defined as a right which a person has by grant or prescription to have a certain enjoyment or use in land of another in which he has no estate of possession.

By the term easement we convey the idea that one person possesses land and another person out of the possession has the right to make a certain use of the land, as to have a roadway or path over it or else to have the owner refrain from making a use of it. It is to be regarded as a permanent interest; interests of a temporary character by mere permission are called "licenses."

Sec. 130. KINDS AND ELEMENTS OF EASEMENTS. Easements are either positive or negative, appendant or in gross.

The first division of easements may be made into those which are positive and those which are negative. A positive easement is a right which one has to do something upon the land of another, as to go across it, to flood it with water, etc. A negative easement is the right to compel the owner to refrain from making a certain use of it, thus the right which one has to have light and air over the land of another is a negative easement. Easements of light and air in this country can arise only by express grant and not by prescription as in England.

Easements are also divided into those which are appendant and those which are in gross. An appendant easement is one which goes with an estate irrespective of the ownership and exists in favor of that estate over a neighboring estate. The benefited estate is called the "dominant estate," and the burdened estate is called the "servient estate." An easement in gross is one possessed by a certain person irrespective of his ownership of any estate. It is purely personal and cannot be assigned.[47] Easements in gross are uncommon.

Sec. 131. ACQUISITION OF EASEMENTS. Easements may be acquired by grant or by prescription.

An easement may arise in the first place by agreement as where it is contained in a deed or any form of grant, or it may arise by long continued usage, in which case we say that it arises by "prescription." To acquire an easement by prescription there must be a claim of the right continued for twenty years and the enjoyment of the easement must be continuous and adverse, that is, claimed as a right and not as a mere favor, and must be open and notorious.

An easement sometimes is said to arise not by express grant or by prescription but *impliedly* from the circumstances. The chief implied easement is an "easement of necessity," existing where land is granted with no outlet except over the land of the grantor. As long as this condition of affairs continues an easement of necessity exists. But no easement can ever so arise over the land of a stranger.[48]

47. Knecken v. Voltz, 110 Ill. 264.

48. Collins v. Prentiss, 15 Conn. 39.

We see herein how an easement differs from a mere license. An easement is claimed as a right—an estate irrevocable and vested, the enjoyment of which, when the right is established the court will protect, as any other estate, while a license exists by consent of or contract with the recognized owner, not in opposition to the owner's estate, but by his consent.

Sec. 132. TRANSFER OF EASEMENTS. Easements may be transferred by the transfer of the servient tenement.

We have seen that easements are called appendant when they are in favor of one estate, called the dominant estate, against another estate, called the servient estate, and that being incidental to the use of the land may pass with a transfer of the land without any express statement in that respect, although the deed sometimes does provide that all easements, ways, etc., are to pass with the grant. Appendant easements cannot be separated from the estate and therefore cannot be transferred independently of it.

Sec. 133. HOW EASEMENTS ARE LOST. Easements are lost through abandonment, by express release and by change of condition making them unnecessary.

A person having an easement may abandon it. We cannot say that a mere disuse of an easement is an abandonment of it but it would be evidence thereof. An easement may be relinquished by express agreement. So by change of circumstances the easement may become no longer of necessity or convenience

and thereby be lost, as where buildings are torn down, etc., or where a roadway is opened up to which there is convenient access, etc.

Sec. 134. PROFITS Á PRENDRE. A profit á prendre is a right to substance of another's land as the right to take coal, wood, fish or turf.

An easement is a mere right to *use* the land of another for some purpose. But there may be a right to *take something* from the land of another. These rights are not common in this day, but in English history a peasant or land-holder might have the right to go upon the land of his lord and take wood, coal, etc., and this right was called a "Profit á prendre," or a Common. There were four chief sorts of commons; first, common of estovers, or the right to take fuel; commons of pasture, or the right to pasture one's cattle; commons of turbary or the right to take turf; commons of piscary or the right to fish. These commons were acquired by grant or prescription and perhaps we need not examine them more at length.[48a]

48a. For further discussion, see Blackstone's Com.

PART VI.

OF THE ACQUIREMENT OF TITLE EXCEPT BY DEED, WILL AND DESCENT.

CHAPTER 24.

TITLE BY PRESCRIPTION AND ADVERSE POSSESSION.

Sec. 135. IN GENERAL. A title to real property may be acquired by long continued occupation of an adverse character.

We find that title to real estate may pass from one to the other by long continued possession under a claim of right, that is to say, under a claim adverse to that of the owner. In such a case the claim must be absolutely adverse and not merely by permission of the other. There are a number of periods of adverse possession which will give a title as we will see in the next section.

Sec. 136. THE PERIODS OF LIMITATIONS. The common law period of limitation by adverse possession was twenty years; statutes have provided other periods, as, seven years, where there is color of title, payment of taxes, etc.

The common law period of limitation was that of twenty years, that is, one must hold property adversely and for twenty years to get a title from the

true owner. In all this time he or someone for him or in privity of title with him must be in actual possession claiming a right. By statutes other periods have been provided, where other elements are present, such as payment of taxes or what is called "color of title," that is to say, where the occupier has a deed which gives him a paper title in good faith and he is not merely an adverse possessor. Thus, seven year's actual possession with color of title and payment of taxes in some states gives a good title. Where there is no color of title the old common law rule of twenty years generally prevails.

Sec. 137. WHAT CONSTITUTES ADVERSE POSSESSION. The possession to be adverse must be an actual possession which need not consist in residence upon the property but must be of some use which would notify the world at large that this person is in possession of the property.

The possession required must be a possession which is not merely constructive but actual. This does not mean, however, that the person claiming the land must live upon it, for if he fences it or farms it or in any way uses it constantly so that the public would be apprized that he was in possession, this would be considered adverse, provided it is really of an adverse character, that is, under a claim of right.

Sec. 138. TACKING SUCCESSIVE INTERESTS. Parties who claim in adverse possession may make out the period of limitation by tacking the possession of several together provided their possessions were continuous and their claims in privity.

It is not required that the same person remain for twenty years in adverse possession but his pur-

chasers and heirs or devisees may complete the adverse possession by continuing to hold it adversely. There can be no tacking of the interests of parties where they hold without privity of title. In the cases we have just mentioned there would be privity of title, but suppose that A holds for ten years and then abandons the possession and B takes it up and continues it for ten years more. Here B could not claim title by reason of A's prior ten years possession, for the holdings can not be tacked together, being of an independent character.

CHAPTER 25.

TITLE BY ESCHEAT AND FORFEITURE.

Sec. 139. MEANING OF ESCHEAT AND FORFEITURE. An estate was forfeited to the king for various reasons. It is said to escheat when there is no heir. There is no such thing as forfeiture of estate in this country.

Where a person had committed certain crimes he forfeited his estate as a portion of his punishment. In this country we have no such thing as forfeiture of property to the state for punishment for crime, but it remains in the person and he may dispose of it by will and at his death without a will it goes to his heirs. Escheat is a term meant to describe the forfeiture of the title to the King or over-lord where he left no heirs. He might be deprived of heirs by a "corruption of his blood," as it was called, where he had committed a crime or there might be no heirs simply because he died without kin. In this country there is no such thing as corruption of blood and therefore no escheat for that reason, yet of course a man may die without heirs and the law must in that case provide some disposition of his property. In such a case it goes to the state or the county.

PART VII.

OF TITLE BY DEED.

CHAPTER 26.

THE CAPACITY BY PARTIES TO GRANT AND TO RECEIVE BY DEED.

Sec. 140. CORPORATIONS. A corporation has the general capacity to receive and to grant real estate.

The powers of a corporation depend upon its charter and as far as the state is concerned a corporation may not have a right to hold an excessive amount of real estate and can be compelled to dispose of the same. But almost every corporation has the power to own some real estate whether that is mentioned in the charter or not because that is a power which is incidental to its other powers. If it has any power to hold real estate it may take a good title to any real estate and give a good title to any real estate whether as far as the state is concerned it has a strict right to hold it or not. A purchaser of real estate from a corporation is therefore usually not concerned whether it has a right to hold the particular estate in question or not as he takes a good title if it has any power whatever to hold real estate.[49]

Sec. 141. ALIENS. Aliens may as a general rule under the statutes sell or buy real estate to the same extent that citizens may but some statutes give the state

49. See generally, Vol. V, in this Series, as to powers of corporations.

a right to compel an alien to sell his real estate after he has held it for a certain number of years.

We may say that an alien may buy and sell real estate almost as freely as a citizen. Some states protect themselves against possible large holdings by an alien by statutes to the effect that after a period of years an alien may be compelled to dispose of the property at the suit of the state and thus convert his property into personal property.

Sec. 142. MINORS. A minor may take and receive real estate but his deeds are voidable by him upon becoming of age.

A person under legal age is called an infant or a minor. He may be a grantee in a deed and also may sell his property but after becoming of age he may have the deed set aside provided he acts within a reasonable time.[50]

Sec. 143. INSANE PERSONS. An insane person has, generally speaking, no power to grant real estate though he may take a title by deed.

An insane person's contracts are either void or voidable and he has no capacity to make deeds of a binding character. It is possible of course that an insane person shall have property deeded to him. He has the capacity to receive real estate.

Sec. 144. MARRIED WOMEN. A married woman at common law was incapacitated to make contracts but modern statutes have given her as full power to grant and to receive real estate as a married man has.

50. See generally, Vol. I, of this Series, as to contracts and deeds of minors.

A woman's capacity to contract was taken from her at common law. There were indeed ways worked out by the conveyancers whereby title to her real estate might pass from her. By our modern laws in respect to married women, she has power to receive and grant real estate. The husband has, of course, an inchoate right of curtesy or dower in her real estate, so that he must join in her deed to convey an unclouded title; but a married man's conveyances are also subject to similar considerations.

CHAPTER 27.

OF THE VARIOUS CLASSES OF DEEDS.

Sec. 145. THE ANCIENT ENGLISH DEEDS. The ancient English deeds were the original deeds of feoffment, gift, grant, lease, exchange and partition; and the derivative deeds of release, confirmation, surrender, assignment and defeasance.

We will examine the ancient English deeds very briefly in this section. The time was when the subject of conveyancing was much more complex than at present as our times tend towards simplicity in such matters. Deeds were formerly executed upon parchment, sometimes in counterpart and sometimes singly. Where the deed was executed by both parties the counterparts were written upon the same parchment, which was then cut into in an irregular fashion so that each part fitted the other and this form of deed was called an "indenture" because of the indented edge, and we have this word until this day in legal instruments which begin, "This Indenture Witnesseth," although the indenting itself has long since been abolished. Deeds which were not indented were called "deeds poll," meaning that they were "polled" or "shaved" even and not indented.

Old English deeds may be known as those which are *original* and those which are *derivative* or which in some way affect an original deed.[51]

51. Blackstone's Commentaries, Book II, star page, 309, ff. Cooley's Edition.

A deed of feofment was the deed whereby the fee was conveyed *in praesenti* and to this deed *livery of seisin* was a necessary ceremony to convey the fee; that is, there must be a present *delivery of possession* in order to transfer the fee. Land could not be enfeofed to take effect in the future. The fee could only be transferred by present transfer accomplished by actual *livery of seisin.*

The deed of gift was a technical name given to a deed whereby an estate tail was granted; it was similar to the deed of feofment, and livery of seisin was likewise essential.

The deed of grant was a deed whereby all estates were granted of which in the nature of the case there could be no livery of seisin, as in the case of a grant of the reversion. But if livery of seisin *could* be had the deed must be one of feofment with livery of seisin.

A deed of lease was a deed for life or years or any less time than the lessor had in the premises; and was the same deed in effect that our lease is today.

A deed of exchange is a deed whereby the parties mutually exchange estates.

A deed of partition is a deed whereby both tenants or tenants in common or copartners agree to divide the land among them each taking a distinct part.

Coming now to the *derivative deeds,* the first of these was the *release* whereby one who has an estate in land releases his estate to the other as where the owner of the fee releases his interest to the tenant. In order for a release to operate at common law it was necessary for the relessee to be in possession.

The deed of confirmation was a deed given to correct or confirm a former deed.

A deed of surrender was the opposite of a release, as where one who has an estate surrenders it to another who has a higher estate.

An assignment was a transfer of a right in an estate as where one lessee assigns his estate to another.

A deed of defeasance was a collateral deed containing conditions upon the performance of which an estate might be defeated.

Sec. 146. THE DEEDS MADE UPON THE STATUTE OF USES. Under the statute of uses, conveyancers, invented forms of deeds which took effect by the language of that statute because they created uses which that statue executed and in this manner livery of seisin was avoided in the conveyance of a fee. They were the deeds of bargains and sale, lease and release and covenants to stand seized.

We have already noticed the statute of uses and we need not occupy space to examine at length the deeds mentioned for they are not in common use today. We know that the statute of uses was passed to give the fee to him who before that time had a mere use in an estate, the bare legal title to which was held in another. Thus if A conveyed to B for the use of C, the statute of uses gave the legal title to C. Under this statute a number of deeds were invented by which uses were created and the statute then operated to convey the fee, and this saved livery of seisin. The *lease and release* was a form of conveyance whereby a lease was given to one as for a year and then released to the lessee. The bargain and sale was a deed whereby the grantor bargained to sell and by his bargain became a trustee for the

grantee and the statute of uses then conveyed the estate to the grantee. A covenant to stand seized was the creation of a use which the statute executed in the covenantee. In all of these deeds a use was created which the statute executed. We need not examine them further. Blackstone treats them fully if any further study is sought.[52]

Sec. 147. PRESENT DAY DEEDS. The present day deeds are warranty deeds, trust deeds and mortgages, release deeds, leases, and assignments.

A warranty deed is a deed used today whereby the grantor warrants the title to the property, that is, he contracts that if the grantee loses the title, or suffers any damage by reason of any defect in it he, the grantor, will make him whole. There are several warranties of title, such as the grantor is the owner and has the right to convey and that there are no encumbrances and that he will give further assurance and defend the title. By statute in many states whereby certain words are used, as "grants and conveys" or as "bargains and sells" certain warranties of title will be implied; and forms of warranty deeds are set out in the statutes with the legal effect that they shall have. A warranty deed is said to convey after acquired title. Thus, if A by warranty deed conveys to B and the title is defective and A afterwards acquires any title it passes to B under the former warranty deed. In all sales of real estate for an agreed price the warranty deed is the usual deed.

52. Blackstone's Commentaries, Book II, star page, 327, ff. Cooley's Ed.

The quitclaim deed is a deed used when it is desired that anyone who may have some claim upon land should convey it but the grantor does not care to make any warranties. By a quitclaim deed one in effect says "I hereby quit my claim to this land." Where one is thought to have any interest which operates as a cloud on the title he is usually asked to quitclaim, but would hardly care to warrant in such a case. So when several tenants in common desire to convey to one of their number a quitclaim deed may be used. A quitclaim deed is as effectual to pass a legal title as a warranty deed but no warranties are contained in it and the grantor merely parts with what, if anything, he has, without warranting that he has any interest whatever.

Trust deeds and mortgages we have already considered.

Leases are deeds by which tenancies are created and we have already considered them.

A release deed is a deed whereby one who has an interest in property under some other deed, releases it. It is used by a mortgagee to release title to the mortgagor and by a trustee to release title obtained by him under the trust deed. The release deed always refers to the deed by which the title which is now released was obtained. Thus a trustee when the debt is paid releases whatever interest he may have by virtue of the trust deed, describing it by date and record number. See the form in the back of this book.

The deed of assignment is a deed whereby one estate is assigned to another as where a mortgagee assigns the mortgage to another. Where a lease is assigned it is usually done by simple indorsement on the back of the lease.

CHAPTER 28.

THE PARTS AND ESSENTIALS TO DEEDS.

Sec. 148. FORMAL PARTS. A deed has certain orderly and formal parts but is now of a simpler nature than it used to be.

A deed is said to have these following parts: first, the *premises,* which sets forth the number and names of parties and the consideration and also the description of the property conveyed;[52a] second, the *habendum and tenendum.* The *habendum* states the quantity of the estate; and the *tenendum* was formerly used to signify the tenure, but as now there is but one form of tenure, the *tenendum* is useless and is seldom used. Where we use the words "to have and to hold" to-day they simply read somewhat as follows: "To have and to hold to himself and his heirs forever." But an examination of the modern deed will show that these ancient provisions which used to extend at length are no longer necessary; though of course the deed must show the estate granted, whether, for instance, for life or in fee. The next part of the deed in old days was the *reddendum* or reservation of rent and this part of a deed we do not find in modern deeds except in leases. Another part of the deed is that which states the conditions upon which the estate is granted, and these are not usually put in deeds, except mortgages and trust

52a. See section 194 for a discussion of the important matter of the description of real estate.

deeds, though the fee is sometimes made defeasible, as we shall notice further. The next part of the deed is that part containing the warranties but in our modern deeds the warranties are usually implied in the words used and are not made extensively and are contained in such words as "grant, bargain and sell," etc., at the beginning of the deed. The next part of the deed is that in which the *covenants* are made in reference to the use of the property, etc., and we will find that land is often granted upon covenants as to its use in our day as well as ancient days. Next comes the *conclusion* which contains the date of the deed, and refers to its execution. After this is the signature and the seal.

A brief reference to the modern form of deed will show how simple it has become.

Sec. 149. THE EXECUTION OF THE DEED. By the execution of the deed we mean the act of making it complete as a deed, by signature and sealing in its completed form. The deed is executed by signature and seal with the intent of making it complete and final, but, also, there must be delivery of it before it takes effect.

Sec. 150. DELIVERY. The deed has no effect without delivery and delivery consists in parting with the deed with the intent of releasing all control over it and making it effective as a legal document.

A deed must not only be properly signed and sealed but it must be delivered before it can take effect. A person may have a deed in his possession which is fully signed and complete in form but the grantee therein can claim nothing by it until it has been delivered to him or to someone for him. The reason

of this is very apparent. One may make a deed before he really makes up his mind to use it and until he finally hands it over it can have no effect.

Delivery may be absolute or upon condition and when upon condition it is said to be delivery *in escrow*. The party to whom it is delivered is called the escrowee and it is his duty to deliver it to the grantee upon the performance of a condition, as for instance, payment of certain money. Thus, when property is purchased the deed is often put up in escrow to be delivered on payment of a certain part of the purchase money. The deed cannot be delivered in escrow to the grantee himself.

Sec. 151. ACKNOWLEDGMENT. Acknowledgment is the act of the grantor before some official in admitting the instrument to be his own for the purposes therein set forth. It is not essential as between the parties but is requisite to entitle the deed to record, and for other purposes.

Before the grantor delivers the deed he generally acknowledges the same before a notary public or other officer and this consists in his admission, that the deed is his own and was given freely and for the purposes set forth in the deed.

A deed may be effective between the parties without acknowledgment provided it was really delivered, but acknowledgment is always desirable and is necessary for certain purposes. In the first place a trumped up charge of fraud on the part of the grantor would be more difficult to sustain. In the second place, acknowledgment is necessary in most states to make the recording of the deed effectual against third parties. In the third place, dower and

homestead cannot be waived by deed except it is acknowledged and in the fourth place, a deed which is acknowledged is said to prove itself, meaning that it can go in as evidence without proof of its execution which would otherwise be necessary.

Sec. 152. ACCEPTANCE. Acceptance is also necessary to the effect of a deed but in the case of children, insane persons and the like it will be presumed.

It is said that acceptance is as necessary as delivery and that is true in this sense, that you cannot compel a man to take an estate against his will, but of course acceptance is usually one with the delivery and does not consist in any special formality. Children who are of tender age, lunatics and the like are *presumed* to have accepted and can take the estate though too weak mentally to signify a willingness to receive it.

Sec. 153. RECORDING. The record of the deed is not essential to its validity in any sense but is necessary for the grantee's protection against subsequent acts of the grantor and should never be neglected.

The purpose of recording the deed is to give notice to all the world of the grantee's rights thereunder and for this reason the grantee should always record the deed for in that only, can he be sure of protection against the acts of the grantor with innocent persons who still rely upon his ownership of the title having no notice by record or otherwise that it has been dispensed with.

CHAPTER 29.

RESTRICTIONS IN DEEDS UPON THE USE OF PROPERTY CONVEYED.

Sec. 154. WHAT RESTRICTIONS PERMITTED. The law permits restrictions as to the use of the land so long as the restriction is not against public policy.

Restrictions in the use of land are not encouraged by the law[53] but are nevertheless permitted so long as they are not against public policy. Thus, there may be restrictions as to what sort of buildings shall be erected, how far from the lot line buildings shall be placed, that the building shall cost a minimum figure or be of a certain type, that certain industries shall never be conducted there, etc. Some restrictions are however, not permitted, for instance when they are for the purpose of creating a monopoly, etc.[54]

Sec. 155. RESTRICTIONS BY WAY OF COVENANT OR CONDITION. The restriction in the deed may be by way of a covenant or condition, the breach of which will defeat the title.

The use of the land may be conveyed by the grantor by way of a *covenant,* the breach of which will give an action for damages and which will be restrained by injunction; or it may be by way of a

53. Hutchinson v. Ulrich, 145 Ill. 336.
54. Burdel v. Grandi, 14 L. R. A. N. S. (Cal.) 909.

condition, that if the land is used in the way prohibited the title shall thereupon revert to the grantor or his heirs. The breach of the covenant will be enjoined or an action for damages will lie on account of it. The breach of the condition operates to cause a forfeiture of title.

Sec. 156. WHEN A RESTRICTION CREATES A CONDITION. A restriction will create a condition defeating the title only in case it is expressly declared to be a condition with the right of re-entry by the grantor and his heirs. Calling a restriction a condition does not in itself make it such.

A court does not favor forfeitures of estates as this is a harsh remedy, and although it permits an estate to be granted upon a condition the non-observance of which will defeat the title, yet the intent of the parties must be plain, and it will enforce a restriction as a covenant and not a condition wherever possible.[55] Thus if it is stated in a deed that the land is granted on the express condition that no flat building shall ever be erected there, the parties might not mean thereby that the breach of that condition would result in a forfeiture of the estate but only mean that the grantee should be subject to an injunction in case he attempted to break the condition or be subject to damages for actual breach. Accordingly the court will call a restriction a *covenant* rather than a condition wherever possible, even though the word "condition" may have been used, provided nothing further is stated to show that the restriction was meant as a condition. It is therefore

55. Post v. Weil, 115 N. Y. 361.

necessary in most states for the grantor to declare somewhat as follows: "That this estate is granted upon the condition that no saloon shall ever be conducted upon the premises and in case of breach of this condition the title shall revert to the grantor, his heirs or assigns, and he shall have the right to reenter and be possessed as of his former estates."

Furthermore the cases hold that the estate is not defeated until the grantor does actually make a reentry.[56]

Sec. 157. AGAINST WHOM RESTRICTIONS MAY BE ENFORCED. Restrictions as to the use of land may be enforced against the grantee and all succeeding purchasers.

A restriction upon the use of land may be enforced against the grantee or his heirs or any person who by descent, will or deed comes into the ownership of the property. Assuming that the restriction is on record or known to the party involved, he takes subject to the restriction. It is not necessary that the restriction be repeated in every successive deed, but a party purchasing or getting an estate in any way is bound by the record and the grantor may thus govern the restriction no matter into whose hands the estate may pass,

Sec. 158. BY WHOM RESTRICTION MAY BE ENFORCED. A restriction may be enforced by the grantor or by anyone for whose benefit the restriction was made.

Restrictions are usually made for the benefit of certain other property, as where a person lays out

56. *Ibid.*

city lots and makes a building restriction upon each of them. Here the restriction upon each lot is in favor of all of the other lots in the same subdivision or block, and subsequent owners of these lots or any of them may enforce the restriction against the owner of any lot. Otherwise restriction would be of no value. It has been created for the purpose of preserving the character of the neighborhood and may be enforced for this purpose by anyone affected.[57]

Sec. 159. WAIVER AND LOSS OF RIGHT TO ENFORCE RESTRICTION. On account of the fact that the court does not favor restrictions upon the use of land the right to enforce such restrictions is easily waived or lost and may be expressly waived by the parties entitled to enforcement.

A person entitled to the right to enforce a restriction may see fit to expressly waive it by written agreement or otherwise. So the right may be lost by conduct or by change of situation. The right must be strictly and promptly enforced otherwise it will be considered as having been waived.[58] Thus if one owns a lot in a block divided into lots upon which there is a building restriction he will lose the right to enforce the restriction if he permits his neighbors or anyone of them to break the restriction without protest. Thus if A owns lot No. 1 and B owning lot 9 breaks a building line restriction without A's protest A will usually be held to have waived the right in respect to lot 2 or 3, etc., and certainly has waived

57. **Evertsen v. Gertsenberg, 186 Ill. 344.**
58. *Id.*

it in respect to lot 9 by not proceeding on first notice to enjoin B from breaking the restriction.

So where the change in the neighborhood is so great that the original purpose and value of the restriction has become lost there will be a loss of the right to enforce the restriction, especially in a court of equity; for instance, if the neighborhood was originally intended as a residence district, it may, owing to the encroachment of business, have lost its value for that purpose. Here no valuable right would be protected by the enforcement of the restriction and enforcement would mean the prevention of improvement along the lines of development in the neighborhood. A court of equity will not enforce the restriction where by change of circumstances, it is no longer of value.

Thus, in a very recent Illinois case, there were covenants not to build beyond a certain line, and complainant brought suit to prevent defendant from violating the covenant. The defendant showed that other parties in the same block had violated the covenant, without protest, and furthermore that the erection of an elevated railway had changed the character of the neighborhood. The court refused an injunction on these grounds. Incidentally, it held that the erection of bay windows, porches and the like, over a building line, is a breach of the covenant.[58a]

58a. Kneip v. Schroeder, 255 Ill. 621.

PART VIII.

TITLE BY DESCENT AND DEVISE.

CHAPTER 30.

INTRODUCTORY.

Sec. 160. EXPLANATORY OF THIS PART. This part treats of the acquisition of title to property from a deceased person by virtue of the laws of succession and of wills.

In this part we will consider what becomes of the property of a person upon his death. We will find that the subject divides itself generally into two parts; first, the disposition to be made of the property of a person who makes no disposition of his own, and in the second place the right of a person to dictate the disposition of his property at death.

Sec. 161. TERMINOLOGY OF THIS PART. In this section a number of terms are defined which are necessary to the understanding of this part.

We have already noticed the meaning of some of the terms we must use in this connection, but we may briefly notice a terminology here for convenience. If a person dies leaving a will he is said to have died "testate" and those who take his property by will are called "devisees" and "legatees." If he dies without leaving a will he dies "intestate," and his succes-

sors are called "heirs at law." A devisee is one to whom *real property* is given by will. A legatee is one to whom *personal property* is given by will. The gift itself is called a *devise* or a *legacy*, as the case may be. A gift of personal property is also called a "bequest." If a person dies leaving an estate he is presumed to have a *personal representative*. In the case of a person dying intestate this representative is called an "administrator." If a personal representative is appointed by will he is called an "executor." Other terms will be defined as we come to them.

As to the necessity of probating an estate, it may be said that if there is a will, it is necessary, unless every person affected settles by mutual agreement, and if there is real estate, the will must be probated to show title. It is seldom advisable to keep a will from probate under any circumstances. If there is no will, the estate should be probated, where the estate is of much value, especially if there is real estate.

CHAPTER 31.

RULES OF DESCENT.

Sec. 162. THE ANCIENT CANONS OF DESCENT. By the common law there were a number of rules governing the descent of real property which were called "canons of descent."

It being once established that it is the policy of the law to pass the property of a person at his death to someone else, instead of having it revert to the state it becomes necessary for the law to indicate who those persons are. It may leave this to the owner himself, but the owner may make no disposition and accordingly the law must have rules of succession.

The early canons of descent were as follows:

(1) "Inheritances shall lineally descend to the issue of the person who last died actually seized *in infinitum* but shall never lineally ascend."

(2) "The male issue shall be admitted before the female." The canon means of course that the sons of man inherited by the common law instead of the daughter, and that the female inherited only in case there were no sons. This is a rule that has been abolished in American Jurisprudence, all the children, either male or female, being equally entitled.

(3) "Where there are two or more males of equal degree the eldest shall inherit." This rule is called the rule of *primogeniture* and gave the estate to the eldest son. The purpose originally was to keep

the inheritance and the consequent loyalty to the lord undivided.

(4) "The lineal descendents in *in finitum* of any person deceased shall represent their ancestor." This rule means that the descendants of a person stand in his place. Thus the eldest son inherits and then his son and then the grandson in preference to the other brothers of the eldest son. In a modified sense this rule is still true, in this, that a person's heirs, as named by the law, stand in his stead and have the same estate that he had.

(5) "On failure of lineal descendants or issue of the person last seized the inheritance shall descend to his collateral relations being of the blood of the first purchaser." As Blackstone says, "If Jeoffrey Stiles purchases land and it descends to John Stiles and John dies seized though without issue; whoever succeeds to this inheritance must be of the blood of Jeoffrey, the first purchaser of this family." This rule is now only true in this sense, that on the death of a person without children the estate goes to his collateral relations, that is, his brothers, cousins and the like.

(6) "The collateral heirs of the person last seized must be his next collateral kinsman of the whole blood." We mean by one of the "whole blood," one that is derived from the same couple of ancestors. In our day the law admits the half blood and the whole blood equally, that is, a man's nearest collateral relations will take without reference to the whole or the half blood.

59. Blackstone's Commentaries, Book II, star page, 208, ff. Cooley's Ed.

(7) "In collateral inheritances the male stocks shall be preferred to the female unless the land in fact descended from a female." This rule is an ancient one, now obsolete.

These are the ancient canons of descent but our modern canons differ from them quite essentially as we will note in the next section.

Sec. 163. THE PRESENT DAY CANONS OF DESCENT. The rule of descent differs in some respects in the different states but may be generally stated as follows:

In the first place when a man dies leaving children these children take his real estate whether or not he leaves a wife or other relatives. The wife of course has her dower and she may have also a portion of the *personal* property, absolutely as her own in the character of an heir. In the second place if a man dies leaving no children, the estate goes to his wife, his parents, his brothers and sisters in portions named by the law, as for instance, that the wife shall get one-half and his parents, brothers and sisters or their descendants shall get the remainder in equal proportions. This in a general way indicates the course of descent. The children are first preferred, and then the other relatives, if there are no children or descendants of children. Inheritances descend *per stirpes* and not *per capita,* just as at common law. That is, if A dies leaving two children and two grandchildren of a child deceased the estate is divided into three parts, one part to each child and one part to the two grandchildren. If the division was per capita the four heirs would each get a one-fourth part.

CHAPTER 32.

DEFINITION AND KINDS OF WILLS.

Sec. 164. WILL DEFINED. A will is a disposition of one's property to take effect at his death. A supplemental addition to the will is called a codicil.

The law permits one to direct how his property shall go upon his death. The direction, itself, if made according to legal requirements is called a will. The law sets out certain formalities and these must be observed.

A will is also called a "testament." The term "codicil" is used to describe an addition to an existing will.

Sec. 165. KINDS OF WILLS. The usual will is in writing signed and witnessed. Oral wills, permitted under rare circumstances, are called nuncupative. A will written and signed by the testator entirely in his own handwriting is called holographic.

The ordinary will is one in printed, typewritten, or handwritten form, and signed and witnessed. In one or two states if a testator writes out the will entirely in his own handwriting and signs it, the will is valid without witnesses. It is then called a holographic will. The law permits one in his last illness and about to die, to dispose of his *personal* property (not his real estate) by oral statement in the presence of witnesses. Such a will is called nuncupative. Such wills are not looked upon with favor, and are very rare.

CHAPTER 33.

THE VALIDITY OF WILLS.

A. Of the Capacity to Make a Will.

Sec. 166. MINORS. A person under age cannot make a will.

The right to make a will is entirely statutory and, generally speaking, it is requisite that the party must be of full age in order to make a will.

Sec. 167. INSANE PERSONS. An insane person cannot make a will except in a lucid interval.

Very clearly one who is insane cannot give his property by will, although if he has lucid intervals he may make a will during such interval.

Sec. 168. WHAT MENTAL CAPACITY REQUIRED. A party must understand the nature of his act in making a will.

A person who makes a will must be strong enough mentally to understand the nature of his act. He need not know enough to perform his ordinary business affairs but he must know what he is doing. Thus, an old man who has become too feeble minded to perform ordinary business affairs may yet know enough to make a will, provided he understands that he is disposing of his property by will.

B. Wills Secured by Fraud, Undue Influence, Etc.

Sec. 169. WILLS OR DEVISES SECURED THROUGH FRAUD. Gifts secured through fraud are void.

Where through fraudulent representations a gift is secured which otherwise would not have been made, as where the beneficiary represents that if the will is made to him, he will do certain things, the will is void.

Sec. 170. WILLS OR DEVISES SECURED THROUGH UNDUE INFLUENCE. Where a gift by will is secured through undue influence the gift is invalid.

Undue influence means such influence that the will of the testator is overcome and he practically makes a will at the dictation of another. Mere persuasion, however great, does not constitute undue influence. Undue influence usually exists in cases where there is a relationship of dependency, as in case of physician and patient, attorney and client, parent and child, etc. Where the circumstances show that there was such an influence upon the testator that the freedom of his mind was thereby destroyed, the will is void. Very often religious beliefs of peculiar nature are involved in cases of undue influence on the strength of which another person works upon the fears or hopes or prejudices of the testator and thus secures a gift to himself.

Sec. 171. WILLS MADE UNDER INSANE DELUSION. A gift made by will under an insane delusion is void. An insane delusion is a belief which is unsupported in fact and refuses to give way to the argument of others.

Wills are often declared void because based upon what the law terms an "insane delusion." An insane delusion differs from insanity in that it is a delusion upon some one subject while as to other subjects the testator may be perfectly rational. Queer beliefs do not constitute insane delusions so long as they have any support in fact or if they are of a mere religious nature. Thus one's belief in spiritualism or religious beliefs by him of a very peculiar sort never constitute insane delusions because religion is a matter scarcely susceptible of proof and rests in belief only. An insane delusion is a belief which is not based upon any facts and persists in the face of evidence and the argument of friends. Thus in an Illinois case, a father believed his son to be guilty of serious crimes and manifested an unnatural hatred for him. As a matter of fact the son was of high standing in the community and there was no evidence of any sort tending to prove him anything except a man of the highest integrity. The court held that his disinheritance by will would be set aside because of an insane delusion respecting him.[60]

C. The Formal Requisites.

Sec. 172. WILL MUST BE IN WRITING. A will must be in writing but there is an exception in case of a gift of personal property in one's last illness.

It is the general rule that a will must be in writing. There is one exception to this when a person makes a will of his personal property when he is *in extremis* in his last illness. Such an oral will of personal property is called a nuncupative will and was for-

60. Snell v. Weldon, 243 Ill. 496.

merely a will permitted to be made by a soldier or sailor *in extremis* in respect to his personal property. By statute the right to make such a will has been extended to others but it is usually provided that there must be a certain number of witnesses present and they must reduce the will in writing in a certain number of days. Real property may never pass by such a will. Nuncupative wills are not favored by the law and are very rarely upheld. This is because of the opportunity for fraud in such cases.

Aside from this exception the law must be in writing. This term includes typewriting or even printing.

Sometimes a reference is made in a will to another document and the testator attempts to make this other document a part of his will. This is called "incorporation by reference." In such a case the document does not become a part of the will unless it is clearly identified by the language of the will itself and is then in existence. Thus in the case of "Bryan's Appeal"[61] a testator left property to W. J. Bryan according to a document to be found among his papers. The court refused to make this document a part of the will because it was not clearly identified and it did not appear that it was in existence when the will was made.

Sec. 173. A WILL MUST BE SIGNED. A will must be signed by the testator or by some one for him in his presence and at his direction.

It is essential that the testator sign the will. If too weak to sign it another may sign it for him in his

61. 77 Connecticut Reports, 240.

presence and at his direction, but otherwise the signature cannot be made by an agent. The signature may be in any form as by a cross where the testator cannot write or is too weak to do so.

Sec. 174. WILL MUST BE PROPERLY WITNESSED. It is essential that the will be witnessed by the number of witnesses provided by law.

A will must be witnessed. In one or two states a holographic will need not be witnessed but in all other cases, and in most states in all cases, the will must be witnessed. A will should not be witnessed by beneficiaries or executors and if it is witnessed by a beneficiary the beneficiary cannot take under the will. It is very essential therefore that completely disinterested parties witness the will.

It is not necessary that the witness read the will.

The will must be witnessed in the presence of the testator. Some cases hold that this means in the uninterrupted range of the testator's vision, that is, the witnesses must be in such a position that he can see them sign, provided he cares to do so.[62] They must not go into an adjoining room or put any barrier between the testator's vision and themselves. An exception would be made of course in the case of a blind person. It follows therefore that witnesses cannot sign elsewhere even though they acknowledge the signature in the testator's presence. The testator may acknowledge to the witnesses but the witnesses must actually sign in the testator's presence.

Sec. 175. THE ATTESTATION CLAUSE. The attestation clause is a clause signed by the witnesses

62. Drury v. Connell, 177 Ill. 43.

asserting the publication of the will and their act of witnessing it at the testator's request.

A form of attestation clause appears in the appendix. It is much better practice to have such a clause, but it is not indispensable and a will is properly witnessed if the witnesses merely sign their names thereupon.

CHAPTER 34.

THE ORDERLY PARTS OF WILLS.

Sec. 176. IN GENERAL. A will does not have to be in any special form but is usually drawn in a certain orderly way.

We will find that if a will is in writing and signed by the testator and properly witnessed it is good though it is informally drawn, but a will properly made should be drawn in an orderly way, and we will notice in the following sections the usual order of a will.

Sec. 177. THE INTRODUCTION. The introduction is a statement that the testator does make, ordain, publish and declare the writing to be his will.

A reference to the form in the appendix will show the form of expression used in the introduction. This form sometimes begins with such words as these: "In the name of God, Amen" and sometimes refers to the uncertainty of life and states that the testator is indebted to Providence for the blessings he enjoys, but these recitals are not now made so often and at such length as formerly.

Sec. 178. THE DEVISES AND BEQUESTS. After the introduction sometimes follows a direction to the executor to pay debts and funeral expenses as soon as conveniently may be. Then follow in order the devises and bequests.

In this part of the will there should be the utmost certainty and there should also be a provision made for all contingencies. It very often appears that a will is so carelessly drawn that its meaning is not clear. For example: Sometimes powers are given which would seem to imply the ownership of property and yet the title is not directly given; and in the event of the death of the donees before the testator no provision is made for the disposition of the estate. This is the part of the will which is the heart thereof and exceeding care should be exercised, in framing it. Wills should always be drawn where possible, by an experienced and able lawyer who knows the legal effect of words used, the effect of possible events, like marriage or birth of child, and is accustomed to consider all contingencies.

Sec. 179. THE RESIDUARY CLAUSE. A residuary clause is often stated which provides for the disposition of all the estate not specially disposed of.

Such a clause is of course unnecessary where all of the estate is given to any one person or class of persons but in the event the will consists of specific devises and legacies, there should be a residuary clause naming some one to whom the residue, if any, is to go.

Sec. 180. THE APPOINTMENT OF AN EXECUTOR. An executor is to be appointed and his appointment usually follows the gifts though it may be at any place in the will.

It is important to name an executor who should be some person in whom the testator has faith, or a trust company qualified by law to act as executor.

In large estates it is often desirable to name a trust company but in the smaller estates this is not usual. Several executors may be named, especially if the estate is a large one, and this makes it reasonably certain that at least one of them will outlive the period of administration. If no executor is named the will is not for that reason invalid but the court will name an "administrator, with the will annexed" or more shortly, "administrator w. w. a."

Sec. 181. THE CONCLUSION. The conclusion of the will is a mere statement that the executor has affixed his name on a certain date.

See the Appendix for the form of the conclusion.

Sec. 182. THE SIGNATURE AND ATTESTATION. The will must be signed and attested as we have heretofore seen.

CHAPTER 35.

THE REVOCATION OF WILLS.

Sec. 183. THE RIGHT TO REVOKE. A will may be revoked at any time before the testator's death unless he is under contract not to revoke.

A will is a revocable instrument. It confers no rights except upon the death of the testator. It takes effect upon death and then alone. A will is completely within the power of the testator until his death and he may make any number of wills, and yet finally die intestate.

It is true that a testator may be under contract to make a will, or not to make a will, and where this contract is upon a full and fair consideration the courts will enforce it.

Sec. 184. METHOD OF REVOCATION. A will may be revoked by another will or codicil or by burning, tearing, obliterating, canceling with the intention of revoking, or it may be revoked by certain circumstances, as subsequent marriage.

How a will must be revoked is governed by local statutes. However, we may say generally, that a will may be revoked in the following manners: First, by another will or a codicil expressly declaring revocation or revoking by implication because covering the same ground. A will does not necessarily revoke the former will, although as a matter of fact it usually

does because it covers the same subject matter. It is also customary not to leave anything to implication but to expressly revoke all former wills. A will may also be revoked by *tearing, obliterating, burning, canceling,* and the like, by the testator or by someone for him in his presence and at his direction with the intention of revoking it. If a will is lost or destroyed it is still in force if there was no intention of revoking it and the destruction was not by the testator or someone for him. It is possible for the testator to revoke a part of a will by obliterating or canceling clauses therein but this is not advisable. Any interlineations made by him are of no effect unless the will is subsequently republished and rewitnessed, otherwise he could make a will without complying with the law of wills. If a testator should write on the bottom of a will or in the margin or even across the face of it "I hereby revoke this will" that would be without effect because it is not a revocation in the manner provided by law.

A will is also usually revoked by subsequent marriage of the testator upon the theory that this is a change of circumstances which he did not have in mind when he made the will.[63] Subsequent birth of child does not now revoke the will although in many states it amounts to a partial revocation. In this case the child will take his portion as heir, the other gifts abating to that extent unless in the will an express intent to disinherit the child appears; and

63. At common law the marriage of a testator did not revoke; but marriage and birth of child, did revoke. Marriage alone, of a testatrix, revoked a will. Statute in many states have made marriage alone sufficient in either case.

this is sometimes advisable because the testator wants to leave his entire estate to the other parent relying upon such person to properly care for the child and thus keeping the estate from being tied up until the child becomes of age.

CHAPTER 36.

THE PROBATE OF THE WILL.

Sec. 185. THE COURT OF PROBATE. After the testator's death the will is to be proved as a matter of record, and this is called probating the will, and courts of probate jurisdiction are established for this purpose and for the purpose of administering estates.

In every jurisdiction courts are established which have the power to administer estates whether testate or intestate. They may or may not be called Courts of Probate. Thus a county court may have probate powers with its other powers, or there may be a court of probate whose sole jurisdiction is to administer estates of deceased persons, and of insane persons and of minors. The will is to be filed in this court and there proved by the witnesses thereto. The executor or administrator is then appointed and the estate administered according to law.

Sec. 186. THE QUALIFICATION OF THE EXECUTOR OR ADMINISTRATOR AND HIS TITLE. The executor or administrator must qualify by showing that he is a person who may act in such capacity and filing the bond required of him and taking his oath of office.

The law provides that an executor or administrator shall have certain qualifications and shall file a bond and take an oath of office. If an executor has been appointed in the will the court will issue letters testamentary to him if he is a person who under the law

can serve as executor. If no executor has been appointed in the will or if the executor named cannot or will not act, then the court will name an administrator.

The executor or administrator takes title to all personal property of the deceased but no title to the real property unless given it by the will and real estate goes directly to the heirs at law or the devisees subject to the executor's or administrator's right to sell it to pay the debts of the estate if the personal property is insufficient for that purpose. The personal property is then used for payment of the debts of the estate and then is distributed by the executor and administrator to the legatees or in case none are named then to the parties named by the law.

Sec. 187. PROOF OF CLAIMS. During the administration of the estate claims are to be proved by the creditors thereof and allowed by the court if found valid.

The estate is to be administered within a certain period provided by the law, as one or two years, and claims must be presented by the creditors of the estate and proved by them by competent evidence.

The law divides claims into classes giving one class priority over others; thus there will be claims of the first class, second class, third class and so on. Thus funeral expenses, etc., the widow's award, etc., and claims of various sorts have priority over claims of general creditors. Of course creditors who have security are not deprived thereof and the security is unaffected by the death of the debtor.

Sec. 188. ACCOUNT, INVENTORIES AND REPORTS. The executor or administrator must make an

Inventory and present his accounts and reports in the manner provided by the law.

Within a short time after the executor qualifies an inventory must be presented to the court showing the condition of the estate of the deceased so far as it has come to the knowledge of the testator. Accounts must be presented and reports filed as by the law provided. There must be at the end of the administration a final account and the final report filed.

Sec. 189. SETTLEMENT AND DISTRIBUTION. After the estate has been in probate the length of time provided by the law, the estate must be settled and distributed, and the executor or administrator discharged, from further duty.

We have already indicated the manner of distribution and settlement. The executor or administrator must do this according to the law of the state in which the probate is had and is then entitled to be discharged. Where the estate is solvent he need not wait the full period to distribute gifts and advance portions but he does this at his own risk unless an order of the court is secured.

PART IX.

CONVEYANCING.

CHAPTER 37.

CONTRACTS TO SELL REAL ESTATE.

Sec. 190. HOW REAL ESTATE IS USUALLY SOLD. Real estate is usually sold by first drawing up a contract between the prospective seller and buyer providing that the seller will sell on certain terms and at a certain price and the buyer will buy upon those terms and at that price provided the title is found good upon examination of the abstract of title to be furnished by the seller.

While the contract between the buyer and seller may take any form and while there may be indeed no contract of an enforceable sort prior to the deed, yet, as a rule, we find that where real estate is sold there is usually a contract of sale drawn up between the parties whereby the seller agrees to sell and the buyer to buy on certain terms within a certain time and upon certain conditions. An abstract is to be furnished by the seller and examined by the buyer in order to discover the soundness of the title. Then after this time, all having been found satisfactory, the deed is made.

As we know from our consideration of the subject of contracts, contracts to sell real estate, though they

may be carried out if oral, are not enforceable unless in writing if one of the parties sees fit to break the agreement and to avail himself of this technical defense.

Sec. 191. THE FORM OF THE CONTRACT OF SALE. The contract of sale is often upon a blank form prepared for that purpose and it provides the seller shall give a merchantable title and that the buyer shall assume the burdens and conditions therein named.

A form of a contract of sale is set forth in the back of this book and should be studied by the reader. Customary forms vary in different localities, but their general purpose is to bind the seller to make a deed and the purchaser to take the land provided it appears that the title is good. When parties agree to buy and sell it is desirable that the bargain be bound between them and yet of course there must be an opportunity to look into the title and fix up the defects if any there be. In this contract of sale, the terms are all agreed upon. The price is stated and if a mortgage is to be given back by the purchaser or to be assumed by him, this is there set out. After the contract is signed it becomes the seller's duty to furnish an abstract of title within a certain time therein stated and it becomes the seller's privilege to then examine the abstract and to report any defects on the title therein found. These defects are then cleared up, if possible, by quitclaim deeds, affidavits and the like and the deed is then given. According to some forms, the buyer, when he signs the contract, agrees to assume all building restrictions which may be of record and consequently he should know if there are any such restrictions before he signs the

contract because by his agreement to assume them he could not afterwards object to them if any were found. Of course it may be his desire to have building restrictions on the land, but at any rate he should know what they are. In reference to other burdens of various sorts he does not assume them unless it is specifically noted in the contract and therefore all these burdens and defects must be removed by the seller before the buyer can be compelled to take the title. After this abstract has been furnished by the seller and examined by the buyer and the title found to be or made satisfactory, the deed is then made between the parties.

Sometimes when the real estate is sold upon installments the contract provides that a certain number of installments are to be paid before a deed is to be given and if the installments are of substantially the same amount as rent would be, it is provided that in case of default by the buyer the installments shall be retained by the seller as liquidated damages.

It is almost always provided in any contract of sale that a sum deposited with the seller by the buyer shall be retained by the seller as liquidated damages in case the buyer does not perform his agreement and to be returned to the buyer in case the seller cannot make a good title or a title satisfactory to the buyer.

This contract of sale must be recorded by the buyer if he would secure absolute protection, unless he goes into immediate possession. At the same time, it is not desirable from the seller's standpoint that the contract be recorded because it may result in clouding his title in case the contract is not carried out by the buyer and the buyer refuses to give him a release from the contract, and this would necessitate

proceedings in court to clear up the title. It also if recorded increases the record of the title, thereby lengthening and increasing the cost of further abstracts. For these reasons it is customary not to record a contract of sale but merely to wait until the deed is made and then record that.

Sec. 192. SELLER TO CONVEY MERCHANTABLE TITLE. The seller agrees to convey a merchantable title subject to burdens assumed by the buyer. A merchantable title is a title which has in it no serious defects preventing its free transfer by the buyer or subjecting him to expenses to clear up his title.

The seller is supposed to give and by his contract stipulates to give a good, merchantable title. A merchantable title is one that is practically free of defects and burdens except such as are specifically assumed in the contract by the purchaser. Thus outstanding mortgages not assumed by the purchaser, unreleased dower, claims of heirs of prior owners, unacknowledged deeds found in the record, defective conveyances, etc., are all burdens upon the title and detract from its merchantability and all these things must be cleared up by the seller before he can compel the buyer to take a deed. The purpose of examining the abstract is to find the possible defects and report them to the seller that he may have them cleared if he can.

Sec. 193. BURDENS ASSUMED BY PURCHASER. The purchaser often specifically assumes certain burdens as mortgages, building restrictions, special assessments yet unpaid, etc.

We have already noticed that the buyer may assume certain burdens when he signs a contract.

There may be an existing mortgage which as a part of his consideration he assumes and agrees to pay or there may be building restrictions upon the record which are assumed by him.

In case there is no mortgage, very often one is made as a part of the transaction where all of the purchase price is not paid down at some later period. Thus the deed is given to the buyer, and as a part of the same transaction he gives back a mortgage to secure a part of the purchase price. Such a mortgage is called a "purchase money" mortgage. It may of course be in the form of a trust deed.

Sec. 194. DESCRIBING THE PROPERTY. The property may be described by metes and bounds or by the legal description if there is any such.

It is desirable that we insert at some place in this book something respecting the description of real property, for this is a very important subject. The reader should be impressed with the importance of care in this respect because a great deal of litigation has been occasioned by mis-descriptions of real property. Very often the property will be wrongly described and the mistake will not be noticed for, perhaps, years afterwards, when it becomes very difficult to clear up the matter. It is very easy to insert "N. E." for "N. W." etc.

Property may be described in two general ways: first, by its "metes and bounds" and second, by its "legal description." Property was formerly described, and it is even now sometimes necessary to describe it, by bounding it with reference to natural or artificial monuments. This form of description is quite vague and often results in doubt and confusion.

Thus in early days a piece of land would be described by starting at a point indicated by a certain tree, describing the tree, or a certain artificial monument, then proceeding in a certain direction to another monument, and so on until the point of beginning. In this description would be found: first, a reference to monuments, natural or artificial; second, the distance traversed in going from monument to monument; third, the direction; and fourth, the quantity of land thus enclosed. Sometimes where we have a legal description it is still necessary to refer to the metes and bounds as shown in the following example which is a mixture of the old and the new form of description:

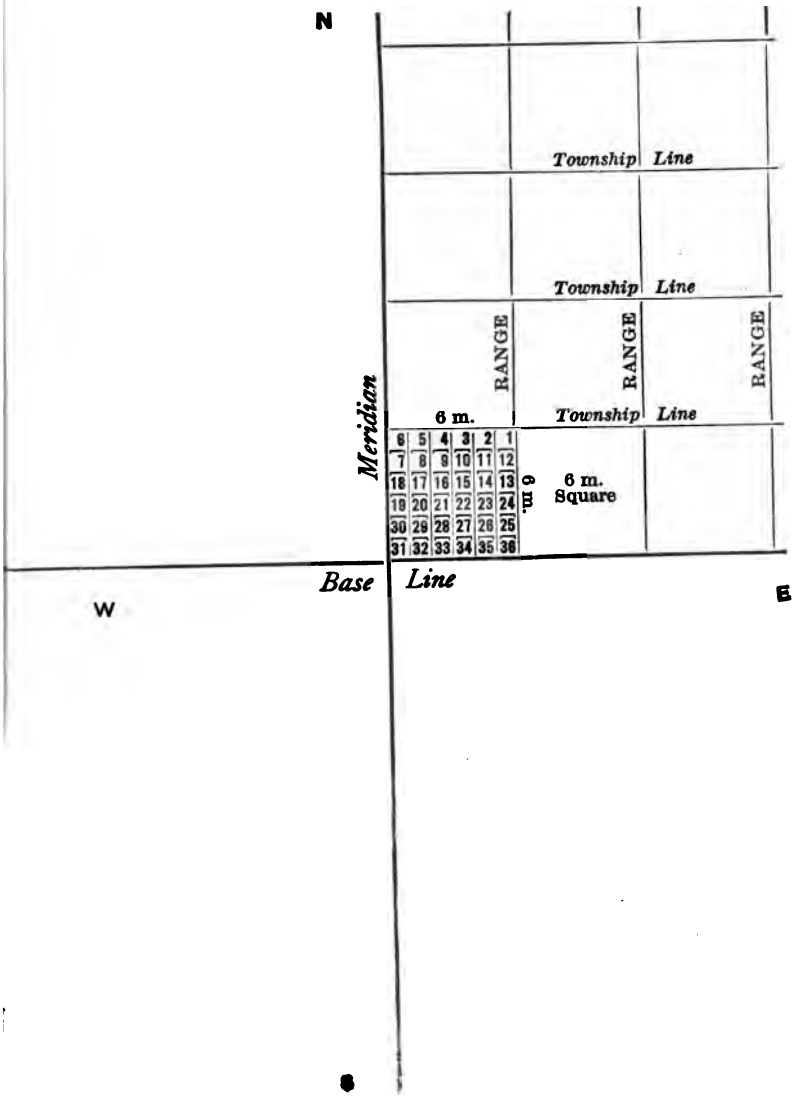
Part of the north 52 acres of the south ½ of the Northeast Quarter of Section 30, Township 41 North, Range 14 East, in the City of Evanston, Cook County, Illinois: Beginning at the intersection of the south line of Mulford Avenue and the west side line of Chicago Avenue, in the City of Evanston; thence southeasterly, along said west line of Chicago Avenue, 186 feet to a point; thence west, at right angles, 53.5 feet to the easterly right of way line of the Chicago & Northwestern Railway; thence north along said easterly right of way line of Chicago & Northwestern Railway 200 feet to the south line of Mulford Avenue; thence east along said south line of Mulford Avenue, being on a line parallel to and 66 feet south of the north line of said South ½ of the Northeast Quarter, Section 30, 51.5 feet to the place of beginning; containing 0.232 of an acre (10,132.5 square feet).

The reader will find it interesting to draw, from this description, a plat of the land described.

Monuments, either natural or artificial, tend to disappear, especially when they consist in trees, posts, etc., and descriptions by metes and bounds are hard to follow. So it was that in the settlement of the states—East of the Atlantic Coast States—the surveyors worked out and applied a description which makes the identification of real property a matter of great simplicity and perfect accuracy. The United States was divided by the surveyors from time to time, as occasion required, into "meridian lines," running North and South, of which there are twenty-four, the first one of which is the dividing line between Ohio and Indiana. It is also divided by lines running East and West which are known as "base lines." East and West of the meridians run parallel lines known as "ranges," which are six miles apart; and North and South of the base lines run parallel lines known as "township lines," which are also six miles apart. These range lines and township lines of course cross each other, making squares six miles by six miles, and containing therefore, thirty-six square miles, and these squares constitute "townships." Each township thus created is divided into thirty-six "sections," which are therefore one mile square, and these sections are numbered consecutively from one to thirty-six. Sections are themselves subdivided into "quarter sections" and so on indefinitely. Any section may contain in it a "subdivision," known by the name of the subdivider or some other name, or the sections may be divided simply into blocks and lots. A description of real estate is thus rendered exact and easy, reading somewhat as follows: "Lot 9 in block 3, in John Brown's subdivision of the East half of the N. W. quarter of section

18, township 39 North, range 14 East of the third principal meridian, in Cook County, Illinois."

The following outline will show the character of this division:


N
Township Line
Township Line
RANGE
RANGE
RANGE
Meridian
6 m.
Township Line
6 m.
6 m. Square
Base Line
W
E
S

CHAPTER 38.

ABSTRACTS OF TITLE AND GUARANTY POLICIES.

Sec. 195. THE ABSTRACT DEFINED. The abstract consists in a brief memoranda of all records affecting the title of the real estate in question.

We know that in the country recording laws provide for the record of transactions relating to real estate, otherwise innocent purchasers and encumbrancers are not affected. Consequently a purchaser of real estate must look to the record to find out whether the title is good. This record includes the patents from the United States government and all deeds, wills, administrations of estates, judgments which create liens, mortgages and trust deeds, suits in respect to the title, and in general any public record that in any way affects the title. Now it becomes a difficult task for the purchaser or his attorney to look through these records and be sure he has missed nothing, especially in large cities or in any community where real estate transactions are of frequent occurrence. Accordingly abstracts are made up by abstracters whereby all transactions affecting the title in question are briefly noted. This abstract is a brief resume of every transaction affecting the title so that one by going through the abstract can follow the history of the title so far as it appears of record. In many communities an owner cannot sell his land unless he furnishes an abstract. This abstract is given to successive purchasers and is brought down to date by each seller.

Sec. 196. ABSTRACTS AND ABSTRACT COMPANIES. There are persons and companies who make a business of furnishing abstracts to real estate.

In many communities especially large cities it becomes a matter of great difficulty to discover everything that is of record, the records being very voluminous. Consequently abstract companies are formed which have experienced abstracters and these companies keep a record of all transactions and are able to furnish on short notice an abstract of title concerning any piece of real estate situated in the territory which they cover.

Sec. 197. GUARANTY POLICY DEFINED. A guaranty policy is a form of insurance of the title.

Some abstract companies write what are called "guaranty policies" which are assurances by the company that the title is good, subject to whatever defects may be named therein. This is simply title insurance and the company must stand good for loss up to the amount named on account of defects not excepted.

A guaranty policy of course does not operate to give a good title but it is merely an insurance upon the title.

Sec. 198. OPINIONS OF TITLE. An opinion of title is a written statement by an attorney or other examiner of the title setting forth that person's opinion of the title based upon his examination of the abstract.

We have seen that the buyer secures an abstract of the title to be examined. Usually he has his attorney to examine this and the attorney reports his

opinion of the title. This opinion is merely the attorney's conclusion when he has examined the title. It sets forth that the attorney has examined certain abstracts therein named and that upon such examination he finds title on a certain day in a certain person subject to the burdens and defects which he then enumerates. This opinion should give the exact state of the title showing all mortgages, liens and claims of whatever sort as shown by the abstracts which he has examined. As we know parties in possession have rights which must be taken account of, and consequently the attorney always finds title subject to the rights of parties in possession, if any. This is merely to protect himself or call attention to the fact that the purchaser must know whether there are any parties in the possession and what their claims are. This opinion of title may be looked upon in a way as a very brief abstract of the abstract.

Where guaranty policies are secured the opinion is sometimes omitted because the guaranty policy is based upon the opinion of the abstracter's attorneys, but many purchasers do not feel safe unless the abstract is also examined by their own lawyers.

CHAPTER 39.

THE TORRENS SYSTEM OF REGISTERING TITLES.

Sec. 199. THE TORRENS SYSTEM DEFINED. The Torrens system is a system whereby titles to real estate are registered as being in a certain person at the date of registration and a certificate of title is issued by the state declaring title in such person.

The method of examining titles by means of the record and the abstracts has seemed cumbersome and wasteful to many persons. Suppose that A buys land in the year 1912. He must have his attorneys examine the title notwithstanding this title may have been examined many times in years past by other attorneys and their opinions given thereupon. Notwithstanding all this examination and bringing down of abstracts there is nothing of record, nothing of legal effect, which states just in whom title is. It was therefore questioned why there might not be a system of *registering* the title and having the state *declare* by certificate that a certain person at a certain date is the legal owner thereof, subsequent transfers being registered and new certificates issued. In 1858 Robert R. Torrens introduced a bill in the Australian Legislature providing for the registration of real estate. This law has been adopted in modified form in England, Ireland, Canada, and some of the States and Territories of the United States, namely, Illinois, California, Massachusetts, Oregon, Minnesota, Colorado, Washington, the Philippine Islands and Hawaii.

It is said that there are three basic elements in the Torrens system: first, *a registered title;* second, *a governmental declaration of the ownership and condition of title,* and third, *a title which may not be disputed.*[64]

The registration of title is really the beginning of a suit to have the title settled and declared to be in a certain person.

Sec. 200. EXTENT AND SUCCESS OF THE TORRENS SYSTEM. The Torrens system has not been widely adopted and has never been generally successful in the sense that it has very materially decreased the other mode of conveying real estate.

The idea of the Torrens System appears to be excellent but it has had strenuous opposition and has not had the success in most states that its vouchers have hoped for. It is, however, comparatively new in this country, the first act having been passed in Illinois in 1895. It is hardly the province of this book to go largely into this doctrine and the whole matter is now in such a state that a prediction of its future extent and value would be a mere matter of opinion. For a detailed consideration of this subject the reader is referred to the book cited in the foot note.[65] That author makes the following statement: "It may be said with confidence that neither the Torrens system nor the recording system is so complex, insecure, slow or costly as to depreciate the natural value of land. Each system possesses, perhaps with some varying degrees, all the necessary elements of

64. Niblack, Analysis Torrens System.
65. Niblack, Analysis Torrens System.

a practical and successful method of conveying and dealing with land. In the present state of our constitutional law, the Torrens system in this country can never produce what it purports to effect, namely, a conclusive certificate of an indefeasible title in the registered owner, and can never be made so simple and secure as the foreign systems. The natural and logical effect of our laws is the development of title insurance, a guaranteed certificate of title, and not the development of a certificate of ownership of an indefeasible title to land, issued by the state. Such is the opinion of many thoughtful persons who are equipped to judge of such matters. But the progress of the Torrens system in this country is not to be impeded by mere adverse opinion as to its adaptability to our laws. A large part of the people in several states desire to have it tried, and the trial is now on. It is useless for its advocates to gain little advantages for it from state legislatures, and it is equally useless for its opponents to throw obstacles in its way. This trial is to be a fair one, it is to be conducted patiently and slowly, and it will not be concluded until the success or failure of the system is demonstrated."

CHAPTER 40.

REMEDIES OF THE PURCHASER AND SELLER.

Sec. 201. IN GENERAL. The purchaser of real estate has two general remedies where the seller refuses to convey according to the contract.

Considering now the case of a purchaser of real estate under a contract of sale which has not been carried out by the seller, that is, where no deed has been given by him, we may say that his remedy is either to sue for damages or to have specific performance. We know that in the ordinary case of a breach of contract there may be only a suit for damages but that in some classes of cases a court of equity will compel *specific performance,* that is, the carrying out of the contract as agreed upon. Sales of real estate constitute one of these classes.

Sec. 202. THE BUYER'S REMEDY OF SPECIFIC PERFORMANCE. A purchaser of real estate may compel the seller to give him the deed where the contract has been fair and the purchaser has done his part.

If the purchaser desires he may appeal to a court of equity where the seller refuses to give him a deed and have a decree of specific performance. He must in such a case show that he is not guilty of a breach of the contract and he must furthermore show that he has not driven a hard bargain. In case he has made an unjust contract the court will leave him to his remedy in an action for damages, yet the court

will not refuse him specific performance for the simple reason that he has obtained a good bargain if there has been nothing unconscionable in his bargain.

If the seller's title is defective but the buyer is willing to take it the buyer may have a decree for specific performance with a sum to be allowed him from the purchase price to offset the defect.

Sec. 203. THE BUYER'S SUIT FOR DAMAGES. The buyer may sue for damages for breach of the contract by the seller and he will be allowed such damages as the seller should have foreseen would result from his breach.

If the buyer desires he may, instead of filing a bill for specific performance, file a suit for damages. Assuming that the buyer is not guilty of a breach of the contract he may have damages for breach by the seller. Damages will be allowed him which he has actually sustained and which the seller should have foreseen from all the circumstances that he would sustain if the contract were broken. These damages might be the difference between the contract price and the market price or there might be damages arising out of special circumstances in any given case.

Sec. 204. THE SELLER'S REMEDY OF SPECIFIC PERFORMANCE. The seller may have specific performance against the buyer.

Just as the buyer may have specific performance, so may the seller on his part have this same remedy in case of a breach by the buyer.

If the seller's remedy is defective he cannot compel the buyer to take it by specific performance because he cannot show that he is not in a condition to per-

form his part of the agreement but even in such a case it has been held that if the defects are slight the seller may still have specific performance if he allows a sum to offset the defect. In such a case, however, the defect must be trivial as compared with the whole value of the bargain and not of a serious or enduring nature.

205. THE SELLER'S SUIT FOR DAMAGES. If the buyer refuses to perform the seller may sue him in damages.

If the seller has performed his part of the agreement or made all proper tenders he may sue the seller for the damages which he has sustained from the loss of the bargain.

APPENDIX A.

FORMS.

APPENDIX A.

FORMS.

1. Contract of Sale of Real Property.

(The following form which has been filled in by the editor is one of those in use in Cook County, Illinois. It was approved by the Chicago Real Estate Board, February 4, 1903, and is copyrighted. It is printed and for sale by Geo. E. Cole & Co., Chicago.)

THIS MEMORANDUM WITNESSETH, That James Brown hereby agrees to purchase at the price of ten thousand ($10,000) dollars, the following described real estate, situated in the County of Cook and State of Illinois: Lot 1, in block 2, in John Doe's Subdivision of the Northwest quarter of the Southwest quarter of section No. 18, Township 39 North, Range 14 East of Third Principal Meridian, and Walter Johnson agrees to sell said premises at said price, and to convey to said purchaser a good and merchantable title thereto, by general Warranty Deed, with release of dower and Homestead rights, but *subject* to: (1) existing leases, expiring April 30, 1912, the purchaser to be entitled to the rents from the date hereof; (2) all taxes and assessments levied after the year 1912; (3) any unpaid special taxes or special assessments levied for improvements not yet completed and to unpaid installments of special assessments which fall due after the date hereof levied for improvements completed; also subject to any party wall agreements of record; to building line restrictions and building restrictions of record.....
.....
.....
.....

Premiums on insurance policies held by Mortgagees shall be paid for by said first party pro rata for the unexpired time. Said purchaser has paid one hundred ($100.00) dollars, as earnest money, to be applied on such purchase when consummated, and agrees to pay within five days after

the title has been examined and found good, or accepted by him, said insurance premium and the further sum of four thousand, nine hundred ($4,900) dollars, at the office of John Smith, Chicago, provided a good and sufficient general Warranty Deed, conveying to said purchaser a good and merchantable title to said premises (subject as aforesaid), shall then be ready for delivery. The balance to be paid as follows: Five thousand dollars on January 15, 1915, with interest from the date hereof at the rate of six per cent per annum, payable semi-annually, to be secured by the purchaser's notes and mortgage, or trust deed, of even date herewith, on said premises, in the form known as the CHICAGO REAL ESTATE BOARD FORM, for improved property.

A Certificate of Title issued by the Registrar of Titles of Cook County, or complete merchantable Abstract of Title, or merchantable copy, brought down to date hereof, or merchantable title Guaranty Policy, shall be furnished by the vendor within a reasonable time, which abstract shall, upon the consummation of this sale, remain with the vendor, or his assigns, as part of his security, until the deferred installments are fully paid. The purchaser or his attorney if an abstract or copy be furnished shall, within ten days after receiving such abstract, deliver to the vendor or his agent (together with the abstract), a note or memorandum in writing, signed by him or his attorney, specifying in detail the objections he makes to the title, if any; or if none, then stating in substance that the same is satisfactory. In case material defects be found in said title, and so reported, then if such defects be not cured within sixty days after such notice thereof, this contract shall, at the purchaser's option, become absolutely null and void, and said earnest money shall be returned; notice of such election to be given to the vendor; but the purchaser may nevertheless elect to take such title as it then is, and in such case the vendor shall convey, as above agreed; provided, however, that such purchaser shall have first given a written notice of such election, within ten days after the expiration of the said sixty days, and tendered performance hereof on his part. In default of such notice of election to perform, and accompanying tender, within the time so limited, the purchaser shall, without further action by either party, be deemed to have abandoned his claim upon said premises, and thereupon this

contract shall cease to have any force or effect as against said premises, or the title thereto, or any right or interest therein, but not otherwise.

Should said purchaser fail to perform this contract promptly on his part, at the time and in the manner herein specified, the earnest money paid as above, shall, at the option of the vendor, be retained by the vendor as liquidated damages and this contract shall thereupon become and be null and void. Time is of the essence of this contract, and of all the conditions hereof.

The notices required to be given by the terms of this agreement shall in all cases be construed to mean notices in writing, signed by or on behalf of the party giving the same, and the same may be served either upon the other party or his agent.

If the taxes and assessments to be paid by the vendor cannot be paid at the time this contract is to be closed then the vendor is to pay same on or before May 1st, next ensuing.

This contract and the said earnest money shall be held by John Smith for the mutual benefit of the parties concerned, and after the consummation of the sale he shall be at liberty to retain the cancelled contract permanently; and it shall be the duty of said John Smith in case said earnest money be retained as herein provided, to apply the same, first, to the payment of any expenses incurred for the vendor by his agent in said matter, and second, to the payment to vendor's broker of a commission of five per cent on the selling price herein mentioned, for his services in procuring this contract rendering the overplus to the vendor.

WITNESS the hands of the parties hereto, this 2nd day of January, A. D. 1912*.

.....
.....
.....

*This form (here filled up by the author of this volume.)

2. Opinion of Title.

WILLIAM H. JONES
ATTORNEY AND COUNSELOR AT LAW
25 North Dearborn Street
CHICAGO

Mr. Alfred W. Bays,
Chicago, Ill.
Dear Sir:

I have examined the abstract of title to the property described as

Lot 14 in Block 1 in Brown's Addition, to Jonesboro village.

Said abstract consisting of

(1) Printed copy of forty-four (44) pages, certified to be a true copy by the Chicago Title and Trust Co., from the government of the United States to March 18, 1874.

(2) A continuation of ten pages consisting of a printed copy certified by the Chicago Title and Trust Co., from March 18, 1874 to October 27, 1894.

(3) A second continuation of 4 pages by the Chicago Title and Trust Co., from October 27, 1894 to June 4, 1902.

(4) A third continuation by the Chicago Title and Trust Co., consisting of 3 pages covering the dates from June 4, 1902 to April 4, 1903.

(5) A fourth continuation by the Chicago Title and Trust Co., consisting of one page, covering the dates from April 4, 1903 to May 4, 1902.

(6) A fifth continuation by the Chicago Title and Trust Co., consisting of 3 pages covering the dates from May 4, 1903 to December 29, 1905.

(7) A sixth continuation by the Chicago Title and Trust Co., of 2 pages covering the dates from December 29, 1905 to November 11, 1909.

(8) A seventh continuation by the Chicago Title and Trust Co., of 3 pages covering the dates from November 11, 1909 to June 9, 1912.

And from such examination I am of the opinion that the title to said property on June 4, 1912, was in

JOHN DOE

subject to the following:

First: A trust deed dated June 12, 1911 and recorded June 19, 1911, in book 11245 at page 356, signed by William Smith and Nellie Smith, husband and wife, to William H. Jones, as trustee to secure their note bearing even date therewith for eight hundred and eighty dollars ($880.00) payable to the order of themselves (and by them en-

dorsed and delivered) on or before three years after date with interest at 5½% per annum payable semi-annually and 7% per annum after maturity.

Second: A special assessment for a system of sewers levied for $38.80 thirty eight dollars and eighty cents, payable in twenty annual installments, confirmed December 15, 1906, all of the installments which are due having been paid

Third: Rights of parties in possession, question of error of survey, claims for liens where no notice has been filed of record.

Fourth: Taxes for the year 1912.

Very truly yours,

WILLIAM H. JONES.

3. Warranty Deed—Statutory Form. (Illinois.)

THIS INDENTURE WITNESSETH, that the Grantor
.....
.....
of the.....in the County of.....
and State of.....for and in
consideration of the sum of.....
Dollars, in hand paid, Convey.. and Warrant.. to.....
.....
.....
of the.....County of.....and State
of.....the following described Real Estate, to wit:
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situated in the.....of.....in the County of.....in the State of.....hereby releasing and waiving all rights under and by virtue of the Homestead Exemption Laws of this State.

.....
.....
.....
.....
.....

Dated, This.....day of.....A. D. 190..

.....(SEAL)
.....(SEAL)
.....(SEAL)
.....(SEAL)

State of.....
} ss.
County of.....

I, ...
.....in and for said County, in the State aforesaid, Do HEREBY CERTIFY, That.....
.....
.....
personally known to me to be the same person..whose name.....subscribed to the foregoing instrument, appeared before me this day in person, and acknowledged that..he..signed, sealed and delivered the said instrument as.....free and voluntary act, for the uses and purposes therein set forth, including the release and waiver of the right of homestead.

GIVEN Under my hand and.....seal, this .....day of.....A. D. 190..

.....

4. Deed—Statutory Form. (New York.)

NEW YORK: Statutory Form of Deed with full Covenants.

This indenture, made the.....Day of..... in the year nineteen hundred and....., between....., of (insert residence), of the first part, and....., of (insert residence), of the second part, witnesseth: That the said party of the first part, in consideration of.....dollars, lawful money of the United States, paid by the party of the second part, his heirs and assigns forever (description),

together with the appurtenances and all the estate and rights of the party of the first part in and to said premises.

To have and to hold the above granted premises unto the said party of the second part, his heirs and assigns, forever.

And the said party of the first part doth covenant with said party of the second part as follows:

First. That the party of the first part is seized of the said premises in fee simple, and has good right to convey the same.

Second. That the party of the second part shall quietly enjoy the said premises.

Third. That the premises are free from incumbrances.

Fourth. That the party of the first part will execute or procure any further necessary assurance of the title of said premises.

Fifth. That the party of the first part will forever warrant the title to said premises.

In witness whereof, the said party of the first part hath hereunto set his hand and seal the day and year first above written.

In the presence of.....

.....

(Acknowledgment before Notary Public.)

5. Quitclaim Deed—Statutory Form. (Illinois.)

THIS INDENTURE WITNESSETH, That the Grantor .....
.....
of the.....in the County of.....
and State of.....for the consideration of .....Dollars,
Convey..and Quit-Claim..to.....
.....
.....
of the.....in the County of.....and
State of.....all interest in the following
described Real Estate, to-wit:.....
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.....
.....
situated in the County of.....in the State of Illinois, hereby releasing and waiving all rights under and by virtue of the Homestead Exemption Laws of the State of Illinois.

WITNESS the hand..and seal..of the said grantor.. this.....day of.....A. D. 190..

.....(SEAL)
.....(SEAL)
.....(SEAL)
.....(SEAL)

(Acknowledgment before Notary Public or other officer; see form 3.)

6. Form of Acknowledgment for Corporation.

State of Illinois } ss:
County of Cook }

On this.....day of....., 19.... before me appeared.....and....., both to me personally known, who being duly sworn, did say that he, the said....., is the president, and he, the said....., is the.....secretary of....., the within named corporation, and that the seal affixed to said instrument is the corporate seal of said corporation, and that the said instrument was signed and sealed in behalf of said corporation by authority of its board of directors, and said.....and..... acknowledged said instrument to be the free act and deed of said corporation.

In testimony whereof, I have hereunto set my hand and affixed my official seal, this, the day and year first in this, my certificate, written.

.....
Notary Public in and for said County and State.

7. Mortgage—Statutory Form. (Illinois.)

THIS INDENTURE WITNESSETH, That the Mortgagor.....
of the.....in the County of.....and
State of.....Mortgage..and Warrant..to
.....
of the County of.....and State of
.....to secure the payment of.....certain
promissory note..., executed by.....
bearing even date herewith, payable to the order of.....
.....
.....
.....
.....
the following described Real Estate, to-wit:.....
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situated in the County of.....in the State of Illinois, hereby releasing and waiving all rights under and by virtue of the Homestead Exemption Laws of this State.
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.....

Dated, This.....day of.....A. D. 19..

.....(SEAL)
.....(SEAL)
.....(SEAL)
.....(SEAL)

(Acknowledged; see form 3.)

8. Assignment of Mortgage.

KNOW ALL MEN BY THESE PRESENTS, That
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the part..of the first part, in consideration of the sum of ..... Dollars, lawful money of the United States of America, to..... in hand paid by..... ..... the part..of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, has....granted, bargained, sold, assigned, transferred and set over, and, by these Presents, do..grant, bargain, sell, assign, transfer and set over unto the said part..of the second part.....heirs, executors, administrators and assigns, a certain INDENTURE OF MORTGAGE, bearing date the.....day of.....in the year One Thousand Nine Hundred.....made by..... ..... and all.....right, title and interest to the premises therein described, as follows, to-wit: .... which said Mortgage is recorded in the Recorder's Office of the County of.....in the State of.....in Book No..... of.....at page.....

TOGETHER with the.....therein described, and the money due or to grow due thereon with the interest, *To have and to hold* the same unto the said part..of the second part,.....executors, administrators, or assigns, FOREVER:..... .... subject only to the provisos in the said Indenture of Mortgage contained:

AND.....do, for.....heirs, executors, administrators, covenant with the said part.. of the second part,.....heirs, executors, administrators and assigns, that there is now actually .....owing on said..... and Mortgage, in principal and interest,..... Dollars, and that.....have good right to assign the same:

AND.....do hereby make, constitute and appoint the said part..of the second part.....true and lawful Attorney, irrevocably, in.....name.., or otherwse, but at.....own proper costs and charges, to have, use, and take all lawful ways and means for the recovery of the said money and interest, and, in case of payment, to discharge the same as fully as.....might, or could do, if these Presents were not made.

IN WITNESS WHEREOF,.....have hereunto set .....hand..and seal.., this..... day of.....in the year One Thousand Nine Hundred.....

SEALED AND DELIVERED IN PRESENCE OF ..... } .....(SEAL) ..... } .....(SEAL)

(Acknowledged, see form 3.)

9. Power of Sale In Mortgage or Trust Deed.

This grant is intended as a security for the payment of the sum of.....dollars, in.....years from the date of these presents, with interest thereon at the rate of.....per cent, per annum, according to the condition of a bond this day executed and delivered by the said.....party of the first part, to the said party of the second part; and this conveyance shall be void if such payment be made as herein specified. And in case default shall be made in the payment of the principal sum hereby intended to be secured, or in the payment of the interest thereof, or any part of such principal or interest, as above provided, it shall be lawful for the party of the second part, his executors, administrators, or assigns, at any time thereafter, to sell the premises hereby granted, or any part thereof, in the manner prescribed by law, and out of all the moneys arising from such sale to retain the amount then due for principal and interest, together with the costs

and charges of making such sale, and the overplus, if any there be, shall be paid by the party making such sale, on demand, to the said party of the first part, his heirs or assigns.

10. Trust Deed—Statutory. (Under Illinois Law of 1879.)

THIS INDENTURE WITNESSETH, That the Grantor, ...
of the.....in the County of.....and State of.....for and in consideration of the sum of.....Dollars, in hand paid, CONVEY..AND WARRANT..to..... .....of the.....County of.....and State of.....the following described Real Estate, to-wit: .....
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situated in the County of.....in the State of Illinois, hereby releasing and waiving all rights under and by virtue of the Homestead Exemption Laws of the State of Illinois, and all right to retain possession of said premises after default in payment or a breach of any of the covenants or agreements herein contained, in trust, nevertheless, for the following purposes:

WHEREAS, The said.....Grantor..herein..... justly indebted upon.....Promissory Note.. bearing even date herewith, payable to the order of.....
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Now, If default be made in the payment of the said..... Promissory Note..or of any part thereof, or the interest thereon, or any part thereof, at the time and in the manner above specified for the payment thereof, or in case of waste or non-payment of taxes or assessments on said premises, or of a breach of any of the covenants or agreements herein contained then and in such case the whole of said principal sum and interest, secured by the said.....Promissory Note.., shall thereupon, at the option of the legal holder or holders thereof, become immediately due and payable; and on the application of the legal holder of said Promissory Note.., or either of them, it shall be lawful for the said Grantee, or his successor in trust, to enter into and upon and take possession of the premises hereby granted, or any part thereof, and to collect and receive all rents, issues and profits thereof; and in his own name, or otherwise, to file a bill or bills in any court having jurisdiction thereof against the said party of the first part,.....heirs, executors, administrators and assigns, to obtain a decree for the sale and conveyance of the whole or any part of said premises for the purpose herein specified, by said party of the second part, as such trustee or as special commissioner, or otherwise under order of court, and out of the proceeds of any such sale to first pay the costs of such suit, all costs of advertising, sale and conveyance, including the reasonable fees and commissions of said party of the second part, or person who may be appointed to execute this trust, and..... Dollars attorney's and solicitor's fees, and also all other expenses of this trust, including all moneys advanced for insurance, taxes and other liens or assessments, with interest thereon at 7 per cent per annum, then to pay the principal sum of said note.., whether due and payable by the terms thereof or the option of the legal holder thereof, and interest due on said note..up to the time of such sale, rendering the overplus, if any, unto the said party of the first part,..... legal representatives or assigns, on reasonable request, and to pay any rents that may be collected after such sale and before the time of redemption expires, to the purchaser or purchasers of said premises at such sale or sales, and it shall not be the duty of the purchaser to see to the application of the purchase money.

WHEN, The said note..and all expenses accruing under this Trust Deed shall be fully paid, the said Grantee or his

successor or legal representatives shall re-convey all of said premises remaining unsold to the said Grantor..or..... heirs or assigns, upon receiving his reasonable charges therefor. In case of the death, resignation, absence, removal from said.....County, or other inability to act of said Grantee.....then .....of said.....is hereby appointed and made successor in trust herein, with like power and authority, as is hereby vested in said Grantee. It is agreed that said Grantor..shall pay all costs and attorney's fees incurred or paid by said Grantee or the holder or holders of said note..in any suit in which either of them shall be plaintiff or defendant, by reason of being a party to this Trust Deed, or a holder of said note.., and that the same may be a lien on said premises, and may be included in any decree ordering the sale of said premises and taken out of the proceeds of any sale thereof.

WITNESS, The hand..and seal..of said Grantor..this .....day of.....A. D. 190.. .....(SEAL) .....(SEAL)

(Acknowledged, see form 3.)

11. Long Form of Trust Deed. (Illinois.)

THIS INDENTURE, Made this.....day of.....in the year of our Lord, One Thousand Nine Hundred and.....(A. D. 19..) between..... ....party of the first part and the

CHICAGO TITLE AND TRUST COMPANY,

a corporation created and existing under the laws of the State of Illinois and doing business in the City of Chicago, County of Cook and State of Illinois, party of the second part, AS TRUSTEE, as hereinafter specified, witnesseth:

THAT, WHEREAS the said..... ....justly indebted to the legal holder or holders of the Principal Promissory Note hereinafter described in

the PRINCIPAL SUM of.....DOLLARS, secured to be paid by the one certain Principal Promissory Note of the said.....bearing even date herewith, made payable to the order of.....and by.....duly endorsed and delivered, in and by which said Principal Note the said.....promise..to pay the sum of.....DOLLARS, in.....years after the date thereof, with interest thereon until maturity at the rate of.....per centum per annum, payable semi-annually, on the .....day of.....and of .....in each year, which said several installments of interest until the maturity of said principal sum are further evidenced by.....interest notes or coupons of even date herewith; all of said principal and interest notes bearing interest after maturity at the highest rate for which it is now in such case lawful to contract, and all of said principal and interest payments being made payable in gold coin of the United States of America of the present standard of weight and fineness, at such Banking House in the said City of Chicago, as the legal holder or holders of said principal note may, from time to time, in writing appoint, and in default of such appointment, then at the office of the CHICAGO TITLE AND TRUST COMPANY, in said City of Chicago; in and by which said principal note it is agreed that if default be made in the payment of any one of the installments of interest thereon, and such default shall continue for thirty days after such installment becomes due and payable as aforesaid, then, at the election of the legal holder or holders of said principal note, the said principal sum secured thereby, together with the accrued interest thereon, shall at once become due and payable; said election to be made at any time after the expiration of said thirty days, without notice.

THE IDENTITY of said principal note is evidenced by the certificate thereon of said Trustee.

NOW, THEREFORE, the said party of the first part, for the better securing of the payment of the said principal sum of money and said interest, and the performance of the covenants and agreements herein contained by the said party of the first part to be performed, and also in consideration of the sum of One Dollar in hand paid, the receipt whereof is

hereby acknowledged, does by these presents CONVEY AND WARRANT unto the said party of the second part its successors and assigns, the following described Real Estate, situate, lying and being in the..... COUNTY OF COOK AND STATE OF ILLINOIS, to-wit:.....
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TOGETHER with all and singular the tenements, hereditaments and appurtenances thereunto belonging, and the rents, issues and profits thereof; and all apparatus and fixtures of every kind for the purpose of supplying or distributing heat, light, water or power, and all other fixtures in, or that may be placed in any building now or hereafter standing on said land, and also all the estate, right, title and interest of the said party of the first part of, in and to said premises.

TO HAVE AND TO HOLD the above described premises, with the appurtenances and fixtures, unto the said party of the second part, its successors and assigns, forever, for the purposes, uses and trusts herein set forth, free from all rights and benefits under and by virtue of the Homestead Exemption Laws of the State of Illinois, which rights and benefits are hereby expressly released and waived.

AND SAID PARTY OF THE FIRST PART, for said party, and for the heirs, executors, administrators and assigns of said party, does covenant and agree with the said party of the second part, for the use of the holder or holders of said principal note, until the indebtedness aforesaid shall be

fully paid, to keep said premises in good repair and not to suffer any part of said premises to be sold or forfeited for any tax or special assessment whatsoever, or suffer any lien of mechanics or materialmen to attach to said premises nor do, nor permit to be done, upon said premises, anything that may impair the value thereof, or the security intended to be effected by virtue of this instrument; and in case of failure of said party of the first part thus to pay such taxes or special assessments before the commencement of the annual tax sale in said county, or to keep the buildings on said premises in good repair, or to pay any such liens of mechanics or material men, then said party of the second part, or the holder or holders of said principal note, may at his or their option, pay such taxes or special assessments, or redeem said premises from any tax sale, or purchase any tax title obtained, or that shall be obtained thereon; and said party of the second part, or the holder or holders of said principal note may, at any time, pay or settle any and all suits or claims for liens of mechanics or material men, or any other claims that may be made against said premises, or make repairs to said premises; and all moneys paid for any such purpose, and any other moneys disbursed by the party of the second part or the legal holder or holders of said principal note to protect the lien of this Trust Deed, with interest thereon at the highest rate for which it is now in such case lawful to contract, shall become so much additional indebtedness secured by this Trust Deed, and be paid out of the rents and proceeds of sale of the lands and premises aforesaid, if not otherwise paid by said party of the first part; and it shall not be obligatory to inquire into the validity of such tax deeds, taxes or special assessments, or of sales therefor, or of liens of mechanics or material men, or into the necessity of such repairs, in advancing, moneys in that behalf as above authorized; but nothing herein contained shall be construed as requiring the said party of the second part, or the legal holder or holders of said principal note, to advance or expend money for taxes or special assessments, or for other purposes aforesaid.

AND AS ADDITIONAL SECURITY for the payment of the indebtedness aforesaid, the said party of the first part, for said party, and for the heirs, executors, administrators and assigns of said party, covenants and agrees to keep all

buildings and fixtures that may be upon the said premises, at any time during the continuance of the said indebtedness, insured against loss or damage by fire, for the full insurable value of such buildings and fixtures, in such responsible insurance company or companies as may be approved by the party of the second part, or the holder or holders of said principal note, and to make all sums recoverable upon such policies payable to the party of the second part, for the benefit of the holder or holders of said principal note, by the usual mortgagee or trustee clause to be attached to such policies, except in case of sale under foreclosure hereof, from which time and until the period of redemption shall expire, the same shall be made payable to the holder of the certificate of sale, and to deliver all such policies to the said party of the second part, or the holder or holders of said principal note, and in case of failure to insure as above provided, the party of the second part, or the holder or holders of said principal note, may procure such insurance, and all moneys paid therefor, with interest thereon at the highest rate for which it is now in such case lawful to contract, shall become so much additional indebtedness secured by this Trust Deed; but it shall not be obligatory upon said party of the second part, or any holder of said note, to advance or pay for such insurance in case of such failure to insure.

AND IT IS FURTHER COVENANTED AND AGREED, that in case of default for thirty days in making payment of any of said notes, or any installment due in accordance with the terms thereof, either of principal or interest, or of a breach of any of the covenants or agreements herein contained to be performed by the party of the first part, or the heirs, executors, administrators or assigns of said party, then the whole of said principal sum hereby secured shall, at once, at the option of the holder or holders of said principal note, become immediately due and payable, without notice to said party of the first part, or the heirs, legal representatives, or assigns of said party.

And thereupon the legal holder or holders of said principal note, or the party of the second part, for the benefit of the legal holder or holders of said note, shall have the right to immediately foreclose this Trust Deed, and upon the filing of any bill for that purpose, the court in which such bill is filed may at once, and without notice to the said party of the first part, or any party claiming under said party, ap-

point a receiver for the benefit of the legal holder or holders of the indebtedness secured hereby, with power to collect the rents, issues and profits of the said premises, during the pendency of such foreclosure suit, and until the time to redeem the same from any sale that may be made under any decree foreclosing this Trust Deed, shall expire.

AND IN CASE OF FORECLOSURE of this Trust Deed, in any court of law or equity, a reasonable sum shall be allowed for the solicitors' and stenographers' fees of the complainant in such proceeding, and also all outlays for documentary evidence and the cost of a complete abstract of title to said premises, and for an examination of title for the purpose of such foreclosure; and in case of any other suit, or legal proceeding, wherein the said party of the second part, or the holder or holders of said principal note, shall be made a party thereto by reason of this deed, the reasonable fees and charges of the attorneys or solicitors of the party of the second part and of the holder or holders of said principal note so made parties, for services in such suit or proceeding, shall be a further lien and charge upon the said premises, under this deed; and all such attorneys', solicitors' and stenographers' fees and other charges shall become so much additional indebtedness secured by this Trust Deed, and be paid out of the proceeds of the sale of said premises, or from rents, as other costs, if not paid by said party of the first part.

And out of the proceeds of any sale, under foreclosure of this Trust Deed, shall be paid: First—All the costs of such suit or suits, advertising, sale and conveyance, including attorneys', solicitors', stenographers', trustees' fees, outlays for documentary evidence and cost of said abstract and examination of title. Second—All the moneys advanced by the party of the second part, or any one or more of the holders of said principal note, for any purpose authorized in this Trust Deed, with interest on such advances at the highest rate for which it is now in such case lawful to contract. Third—All the accrued interest remaining unpaid on the indebtedness hereby secured. Fourth—All of said principal money remaining unpaid. The overplus of the proceeds of sale, if any, shall then be paid to the said party of the first part, or the heirs, legal representatives or assigns of said party, on reasonable request.

A RECONVEYANCE of said premises shall be made by the party of the second part, to said party of the first part, or to the heirs or assigns of said party, on full payment of the indebtedness aforesaid, the performance of the covenants and agreements herein made by the party of the first part, and the payment of the reasonable fees of the said party of the second part.

It is expressly agreed that neither the said Trustee, nor any of its agents or attorneys, nor the holder or holders of any note hereby secured, shall incur any personal liability on account of anything that it, he or they may do or omit to do under the provisions of this deed, except in case of its, his or their own gross negligence or misconduct.

In case of the inability or refusal to act of the said party of the second part at any time when its action hereunder may be required by any person entitled thereto, then..... .....of said Cook County, shall be and.....is hereby appointed and made successor in trust to the said party of the second part under this Trust Deed, with identical powers and authority, and the title to said premises shall thereupon become vested in such successor in trust for the uses and purposes aforesaid.

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WITNESS the hand..and seal..of said party of the first part, the day and year first above written.

.....(SEAL)
.....(SEAL)
.....(SEAL)
.....(SEAL)

State of.....
} ss.
County of.....

I,.....
A NOTARY PUBLIC in and for said County, in the State aforesaid, DO HEREBY CERTIFY That.....
.....
personally to me known to be the same person.....whose name.....subscribed to the

foregoing instrument, appeared before me this day in person and acknowledged that.....signed, sealed and delivered the said Instrument as.....free and voluntary act for the uses and purposes therein set forth, including the release and waiver of the right of homestead.

GIVEN under my hand and Notarial Seal this..... day of.....A. D. 19...

.....
Notary Public.

The principal note mentioned in the within Trust Deed has been identified herewith.
Register No.....

CHICAGO TITLE AND TRUST COMPANY, Trustee,

By.....

IMPORTANT For the protection of both the borrower and lender, the principal note secured by this Trust Deed should be identified by the CHICAGO TITLE AND TRUST COMPANY, Trustee, before the Trust Deed is filed for record.

12. Principal Trust Deed Note.

$5,000 Chicago, Illinois, Jan. 15, 1912.

Three years after date for value received, we promise to pay to the order of ourselves the principal sum of Five thousand ($5,000) dollars, in gold coin of the United States of America of the present standard of weight and fineness, with interest thereon until the maturity hereof at the rate of six per centum per annum, payable in like gold coin, on the fifteenth day of January and of July in each year, and with interest after maturity until paid at the highest rate for which it is now in such case lawful to contract; which said several installments of interest until the maturity of said principal sum are further evidenced by six (6) interest notes or coupons of even date herewith, with interest after due at the highest rate for which it is now in such case lawful to contract, payable in like gold coin, and the said payments of both principal and interest are to be made at such Bank-

ing House in the City of Chicago, in the State of Illinois, as the legal holder or holders of this principal note may, from time to time, in writing appoint, and in default of such appointment, then at the office of the CHICAGO TITLE AND TRUST COMPANY, in said City of Chicago.

It is hereby agreed that if default be made in the payment of any one of the installments of interest aforesaid, at the time and place when and where the same becomes due and payable as aforesaid, and such default shall continue for thirty days after such installment becomes due and payable as aforesaid, then at the election of the legal holder or holders hereof, the said principal sum, together with the accrued interest thereon, shall at once become due and payable at the place of payment aforesaid; said election to be made at any time after the expiration of said thirty days without notice. The payment of this note is secured by Trust Deed, bearing even date herewith, to the CHICAGO TITLE AND TRUST COMPANY, Trustee, on real estate in the County of Cook and State of Illinois.

Principal Note No. 1.

This is to certify that this is.... the Principal Note....described in a Trust Deed to Chicago Title and Trust Company, Trustee, dated....

Register No....

Chicago Title and Trust Company, Trustee

By.....

JAMES BROWN.

NELLIE BROWN.

.....

.....

(Endorsed on back "James Brown, Nellie Brown.")

13. Coupon Trust Deed Note.

$..... Chicago, Illinois, Jan. 15, 1912.

We promise to pay to the order of ourselves, one hundred fifty ($150) dollars in gold coin of the United States of America, of the present standard of weight and fineness, on the 15th day of July, A. D. 1912, at such Banking House in the City of Chicago, in the State of Illinois, as the holder or holders of the principal note hereinafter mentioned may from time to time in writing appoint, and in default of such

appointment, then at the office of the CHICAGO TITLE AND TRUST COMPANY in said City of Chicago, with interest, after maturity, until paid, at the highest rate for which it is now in such case lawful to contract, being for an installment of interest on our principal note of even date herewith, for the sum of $5,000. The payment of this note is secured by Trust Deed to the Chicago Title and Trust Company, Trustee, on real estate in Cook County, Illinois.

Coupon No. 1.

JAMES BROWN.
NELLIE BROWN.
.....
.....

(Endorsed on back by the makers.)

14. Another Form of Principal Note.

$..... .....19..
.....after date, for
VALUE RECEIVED,.....Promise
to pay to the order of.....
the principal sum of.....Dollars,
with interest thereon at the rate of.....per cent
per annum, payable.....yearly, to-wit:
on the.....day of.....and of
.....in each year, until
said principal sum is fully paid. Both principal and interest
are payable at.....

The several installments of interest, aforesaid, for said
period,.....are further
evidenced by.....interest notes or
coupons, of even date herewith.

It is further expressly agreed, that, if default be made in the payment of any one of the installments of interest aforesaid, at the time and place aforesaid, when and where the same becomes due and payable, and such default shall continue for.....days after such installment becomes due and payable, as aforesaid, then, and in that event, the said principal sum of .....Dollars shall, at the election of the legal holder hereof, at once become and be due and payable, anything hereinbefore contained, to the contrary notwithstanding; such election to be made at any time after the expiration of said.....days, without notice.

The payment of this note is secured by.....
on real estate in.....
No..... .....
.....

15. Release Deed.

KNOW ALL MEN BY THESE PRESENTS, That I, William H. Jones, trustee, and holder of the note secured by the trust deed hereinafter described of the County of Cook and State of Illinois, for and in consideration of one dollar, and for other good and valuable considerations, the receipt whereof is hereby confessed, do hereby remise, convey, release, and quit-claim, unto James Brown, and Nellie Brown, his wife, of the County of Cook and State of Illinois, all the right, title, interest, claim, or demand whatsoever I may have acquired in, through, or by a certain Trust Deed bearing date the 29th day of December A. D. 1905 and recorded in the Recorder's Office of Cook County, in the State of Illinois in Book 8923 of Records page 47 as Document No. 3801805 to the premises therein described as follows, to-wit: Lots thirteen (13) and fourteen (14) in block one (1) in Dingee's Addition to Wilmette Village, according to the plat thereof recorded October 21, 1873, in Book 6 of Plats, Page 26, as Document 131865, in Cook County. Illinois, situated in the County of Cook, in the State of Illinois. Together with all the appurtenances and privileges thereunto belonging or appertaining.

WITNESS my hand and seal this 22nd day of October, A. D. 1910. WILLIAM H. JONES, Trustee and holder of the note above described.

State of Illinois } ss.
Cook County, }

I, Walter Johnson, a Notary Public in and for the said County, in the State aforesaid, DO HEREBY CERTIFY that William H. Jones, trustee, and owner of the note above described personally known to me to be the same person.... whose name is subscribed to the foregoing Instrument, appeared before me this day in person, and acknowledged that he signed, sealed and delivered the said instrument as his free and voluntary act, for the uses therein set forth.

GIVEN under my hand and notarial seal, this 22nd day of October, A. D. 1910. WALTER JOHNSON, Notary Public.

16. Lease—Short Form.

THIS AGREEMENT, Made this.....day of .....A. D. One Thousand Nine Hundred.....(A. D. 191).... Between..... .....party of the first part, and.....party of the second part.

WITNESSETH, That the said party of the first part does hereby lease to the said party of the second part, the following described property, situate in the City of Chicago, County of Cook and State of Illinois, viz.:..... .... for the term .....beginning the.....day of.....A. D. 191.., and ending the..... day of.....A. D. 191..

And the party of the second part agrees to pay as rent for said premises the sum of..... .....Dollars,.. payable.....in payments of..... Dollars each, to-wit:..... ....

AND the party of the second part covenants with the party of the first part, that at the expiration of the term of this lease he will yield up the premises to the party of the first part without further notice, in as good condition as when the same were entered upon by the party of the second part, loss by fire or inevitable accident and ordinary wear excepted; and will pay all assessments that shall be levied upon said premises during said term for water tax.

And the said part.....of the second part further covenant....that.....will permit the party of the first part to have free access to the premises hereby leased for the purpose of examining or exhibiting the same, or to make any needful repairs or alterations of such premises, which said first party may see fit to make; also to allow to have placed upon said premises, at all times, notice of "For Sale" or "To Rent" and will not interfere with the same,

IT IS FURTHER AGREED, by the said party of the second part that neither he nor.....legal representatives will underlet said premises, or any part thereof, or assign this Lease, or make any alterations, amendments or additions to the buildings on said premises, without the written assent of the party of the first part had thereto, and that neither he nor.....legal representatives will use said premises for any purpose calculated to injure or deface the same, or to injure the reputation or credit of the premises or of the neighborhood.

It is further agreed by the party of the second part that he will keep said premises in a clean and healthy condition, in accordance with the ordinances of the City, and the directions of the Board of Health and Public Works.

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.....

AND IT IS FURTHER EXPRESSLY AGREED between the parties, that if default shall be made in the payment of the rent above reserved, or any part thereof, or in any of the covenants or agreements herein contained, to be kept by the party of the second part.....heirs, executors, administrators or assigns, it shall be lawful for the party of the first part, or.....legal representatives to enter into and upon said premises, or any part thereof, either with or without process of law, to re-enter and repossess the same, and to distrain for any rent that may be due thereon, at the election of said party of the first part; and in order to enforce a forfeiture for non-payment of rent, it shall not be necessary to make a demand on the same day the rent shall become due, but a demand and refusal or failure to pay at any time on the same day, or at any time on any subsequent day, shall be sufficient; and after such default shall be made, the party of the second part, and all persons in possession under.....shall be deemed guilty of a forcible detainer of said premises under the statute.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals, the day and year first above written.

.....(SEAL)

.....(SEAL)

.....(SEAL)

17. Guarantee of Lessee's Undertakings.

For value received.....hereby guarantee the payment of the rent and the performance of the covenants and agreements of the party of the second part in the within Lease, in manner and form as in said Lease provided.

Witness.....hand.... and seal.... this..... day of.....A. D. 19....

.....[SEAL.]

18. Assignment of Lease and Acceptance Thereof. (To be used by tenant in assigning to another tenant.)

For value received.....hereby assign all ..... right, title and interest in and to the within Lease unto .....heirs and assigns, and in consideration of the consent to this assignment by the Lessor.....guarantee the performance by said .....of all the covenants on the part of the second party in said Lease mentioned

.....(SEAL)

In consideration of the above assignment and the written consent of the party of the first part thereto,..... hereby assume and agree to make all payments and perform all the covenants and conditions of the within Lease, by said party of the second part to be made and performed.

Witness.....hand.... and seal.... this .....day of.....A. D. 19...

.....(SEAL)

.....(SEAL)

19. Consent to Assignment of Lease.

.....hereby consent to the assignment of the within Lease to.....on the express condition, however, that the assignor shall remain liable for the prompt payment of the rent and performance of the covenants on the part of the second party as therein mentioned, and that no further assignment of said Lease or subletting of the premises or any part thereof shall be made without.....written assent first had thereto.

Witness.....hand.. and seal.. this..... day of.....A. D. 19....

.....(SEAL)

20. Lessor's Assignment of Lease. (To be used by owner upon sale of the premises.)

In consideration of One Dollar, to.....in hand paid, ...hereby transfer, assign and set over to .....and assigns..... interest in the within Lease, and the rent thereby secured .....

Witness.....hand.... and seal.... this .....day of.....A. D. 19...

.....(SEAL)

.....(SEAL)

21. Will.

I, JOHN DOE, of the City of Chicago, County of Cook and State of Illinois, being of sound and disposing mind and memory do hereby make, ordain, declare and publish this as my last will and testament, hereby revoking all former wills by me made.

First. I direct that my just debts and funeral expenses be paid as soon as conveniently may be after my death.

Second. I give to my faithful employee, William Smith, the sum of One Thousand ($1000.00) Dollars.

Third. I give to my nephew, Harry Wilson, my gold watch and chain.

Fourth. All the rest and residue of my estate, whether real or personal, and wherever situated, I give, devise and bequeath to my beloved wife, Mary, to have and to hold the same as her own forever.

Sixth. I hereby appoint my wife Mary as the executrix of this, my last will and testament, and I direct that she be allowed to serve without bond.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this third day of March, 1912.

JOHN DOE (SEAL)

We, the undersigned, hereby certify that the testator, John Doe, made, ordained, published and declared the above instrument, consisting of one page, to be his last will and testament, and in our presence signed the same, and we at his request and in his presence and sight, and in the presence and sight of each other hereby sign the same as witnesses thereto believing the said John Doe to be of sound and disposing mind and memory and about the age of fifty-eight years.

ALEXANDER JACKSON,
JOSEPH H. CROSSLEY.

APPENDIX B.

QUESTIONS AND PROBLEMS.

APPENDIX B.

QUESTIONS AND PROBLEMS.

CHAPTER 1.

1. Define the term property.
2. Distinguish between real and personal property.
3. State some differences in respect to the law applicable arising out of this distinction.
4. Define the term land. What is an incorporeal hereditament?
5. State the chief incorporeal hereditaments.

CHAPTER 2.

6. Give a brief account of feudalism. What is enfeofment? And state the old ceremonies that accompanied same.
7. What was meant by livery of seisin?
8. What was tenure in free socage? What was tenure in villenage?
9. State what we mean by saying that lands are held allodially.

CHAPTER 3.

10. A sold a piece of real estate describing it by its legal description and making no mention of any improvements or fixtures thereon. The land had upon it a residence, a barn, a rail fence, a stack of hay, some growing corn, a wind mill; and the residence had a mirror built into the panel, a heating system consisting of a furnace and steam pipes and coils; in the house were chairs, beds, tables, and other furniture. On the house was a lightning rod. State which of these things passed by the deed and which did not.
11. A rented a building from B for the purpose of living upon the second floor thereof and conducting a print-

ing establishment upon the first floor. He moved in all of his furniture, put up some brackets in the kitchen, screwed some hangers of various sorts in the bath room, put globes upon the electric lights and had a partition built whereby he divided the porch into two parts. In the printing shop he placed a large heavy press, attached some belts to pulleys which he fastened to the walls and built a brick furnace in the basement on solid foundations. When A's term expires what articles can he take away with him?

CHAPTER 4.

12. Are crops to be regarded as real or personal property?

13. What is the character of trees and vines?

CHAPTER 5.

14. Is water real or personal property? If one desires to sell a pond how does he describe it?

15. Is ice personal or real property?

16. If A has a farm that is very rocky in its formation, many of the rocks lying in their natural state upon the surface of the ground, and he sells it, does the purchaser thereof get title to the rocks?

CHAPTER 6.

17. How does the sale of personal property differ from a barter?

18. Distinguish between sale and contract to sell.

19. Can title to an article as yet unidentified pass by a sale? Why?

20. When does title pass in sale of personal property?

21. Define a warranty in a sale of personal property.

CHAPTER 7.

22. Define a gift. State the different kinds thereof and the importance of distinguishing between them.

23. A upon his death bed tells B that he can have his watch at A's death. No delivery is made by A. Assuming that someone objects, can B claim the property as his own?

24. What are the essentials of a gift between living persons?

CHAPTER 8.

25. A goes into a barber shop and while being waited upon leaves a book in the window and goes away forgetting it. B, another customer comes in, discovers the book and claims it. A is unknown. The barber resists B's claim and brings a suit for the possession of the book. Who is entitled to the book as between A, B, and the barber?

26. Assume in the question above that A had dropped the book upon the floor of C's shop and B had found and claimed it. would your answer be the same?

27. What is treasure trove? To whom does it belong on discovery?

CHAPTER 9.

28. How may one acquire title to wild animals? How is such title lost?

29. What is the rule in reference to acquiring title in fish and other marine animals?

CHAPTER 10.

30. What do we mean by title by confusion?

31. A has a lot of sheep and by accident they get mixed with B's sheep. Neither A nor B can identify his own sheep. Who owns the sheep?

32. What do we mean by title by accession?

33. A finds a board belonging to B which he takes a fancy to and carries it away and builds it into a carriage. What are B's rights?

34. Assume under the same circumstances that A thought that the board belonged to him, would this make any difference?

CHAPTER 11.

35. Define a bailment. Name the different classes of bailment. Give some concrete illustrations of bailments.

36. A borrows a book from B and on his way home mislays the book some place and cannot find it. Is A responsible for the loss of the book?

37. A puts his horse in B's care asking B to keep and feed it and give it the care that it needs during A's absence

and agrees to pay him for so doing. B takes the horse out to ride one morning for the purpose of exercising it at the same time doing an errand on his own account. When B dismounts and goes into a shop to make a purchase C steals the horse and it cannot be recovered. Is B liable to A?

38. A pawns some jewelry with B, a pawn broker. B's wife wears them to a party with B's consent. The jewelry is stolen from her. Is B liable to A?

39. What is the lien of a bailee? What bailees have liens?

40. Define a chattel mortgage.

CHAPTER 12.

41. Make a table of estates.

42. Define a freehold estate.

CHAPTER 13.

43. Define a fee simple.

44. From what term do we get the word fee?

45. What words at common law where necessary to create a fee? Are those words still necessary?

46. What was the rule in Shelley's case?

47. Define a base fee. Give an illustration.

48. Define a fee tail.

CHAPTER 14.

49. What is a dower estate? State the essentials in a dower estate.

50. In order for the wife to have dower must she be named in the deed? What would be the result of naming her in the deed?

51. How is dower waived during the life of the husband?

52. Define curtesy. State the elements thereof.

CHAPTER 15.

53. What are conventional life estates?

CHAPTER 16.

54. What is an estate less the freehold?

55. Define an estate for years, an estate from year to year, an estate at will and an estate of sufferance.

56. A rents from B for one year. After the year elapses A remains in possession. What are B's rights? What estate may thereby be created?

57. In the same case after A has held over, B having recognized A as a tenant demands higher rent stating that otherwise A must leave. What are A's rights?

58. Is a lease necessary to create a tenancy? If a tenancy is a periodic tenancy from year to year is it any objection that there is no written lease?

59. Define eviction. What two sorts are there?

CHAPTER 17.

60. A moved into a flat with the understanding that B, his landlord, is to furnish him steam heat. No heat being furnished A refuses to pay the rent. B sues him. Should B recover? How could B protect himself?

61. A rents a flat to B and retains care of the halls. He allows them to become dilapidated and B is injured by a loose board. What are B's rights?

62. A rents a house to B under which there is a defective sewer from which gas escapes. A knows of this defect but B does not and B's family are made ill. Has B any right against A?

63. What care must a tenant give to the premises? While a tenant is in possession of the premises they are injured by fire. Must the tenant replace the injury?

64. A has a lease for one year from B. Must either party give notice to the other of the termination at the end of the year?

65. What notice is necessary to terminate a tenancy from year to year? One from month to month?

66. Define a remainder and state the two sorts thereof.

67. A conveyed to B for life, remainder to C in fee. State why this was good at common law which forbade the transfer of the fee in futuro.

68. Within what time must the contingent estate vest?

69. Define an estate in reversion. Distinguish it from a remainder.

70. What is an executory devise? What could be done at common law by this means which could not be done by deed?

CHAPTER 18.

71. Define an estate in severalty.
72. How did a joint estate differ from a tenancy in common?
73. If A conveys to B, C, and D, do they get a joint tenancy or a tenancy in severalty by the common law?
74. If A dies leaving three children, what estate do they now get?
75. May a tenant in common have partition?
76. If one tenant in common dies to whom does his share go?
77. What was an estate in entirety?

CHAPTER 19.

78. Define a use, and how does it differ from a trust?
79. What was the statute of uses?
80. Tabulate trusts.
81. Is an oral trust good?
82. What is a precatory trust?
83. A leaves property to a college for the purpose of founding a chair. The college is not operated for private profit. He creates a perpetual trust. Is it good? Why?
84. A leaves to a trust company a fund of money to be used perpetually for the care of his burial lot. Is this good? Why?
85. What is *cy pres* doctrine?
86. Where trust property consists in uninvested funds what is the rule of investment?
87. What is a spendthrift trust?
88. What are the kinds of implied trusts?
89. A takes title to property purchased with funds furnished by B, a stranger. B claims the property as his own but A refuses to convey to him. Can B force him to do so?
90. Give a few examples of constructive trusts.

CHAPTER 20.

91. What is a conditional estate?

CHAPTER 21.

92. What was the early view of a mortgage? What is the present view?

93. What is a trust deed?

94. A conveyed to B by warranty deed. A now claims that desiring to borrow some money from B, B let him have the same upon the deed being made with an agreement to reconvey to A when the debt should be paid and that B now refuses to reconvey. If A can establish this case by proof will the courts give him any, and if so what relief?

95. What is a power of sale in a mortgage? Is it good?

96. What is the meaning of the phrase "Once a mortgage, always a mortgage"?

97. How may the mortgagee make his mortgage good against third persons subsequently dealing with, or acquiring rights against, the mortgagor?

CHAPTER 22.

98. Who has the right of possession under a mortgage?

99. A mortgages his property to B and then sells the property to C who agrees to pay the mortgage. What is the relationship here between A and C? What rights has B against A and A against C?

100. May a mortgagee sell the debt? How is this accomplished?

101. What do we mean by foreclosure?

102. What kinds of foreclosures are there?

103. What two meanings are there to the term redemption? Describe the process of redemption in both cases.

104. A mortgages his property to B and then consequently mortgages it to C who has full knowledge of B's mortgage. Describe how C may avail himself of his security.

CHAPTER 23.

105. What is an easement? Define dominant estate and servient estate.

106. What is an easement by prescription? In what other way may an easement arise?

107. How is an easement lost?

108. What do we mean by a profit? How does it differ from an easement?

109. A has a right of way over B's land which he has used continuously for twenty years. B sells his land to C. Can A avail himself of this right of way if C objects?

110. What are negative easements? Give an illustration.

CHAPTER 24.

111. What is title by adverse possession?

112. How long must one remain in possession in order to get title by adverse possession? What must be the character of the possession?

113. A gets a void tax deed to certain property but never takes possession. When he afterwards brings suit for the possession of the land the defendant proves the deed to be absolutely void. Who would prevail? Why?

114. What must be the character of the possession? Must it consist in residence upon the property?

115. A took possession of B's land claiming title thereto and remaining there ten years and then moved away. C thereupon moved upon the land claiming title and remaining there ten more years. At the end of the ten years B sues C for the possession of the land. C sets up a title by adverse possession. Can he make this case? Why?

CHAPTER 25.

116. What is title by escheat?

117. What do we mean by forfeiture?

118. Suppose that A, a native of this country, dies without heirs, to whom does his land go?

CHAPTER 26.

119. State generally the capacity of a corporation to deal in real estate?

120. State generally the capacity of an alien to deal in real estate?

121. May a minor convey real estate? May he take a good title by deed?

122. May a married woman buy and sell real estate?

CHAPTER 27.

123. Name some old common law deeds.

124. Name the present day deeds and state the uses of each one named.

125. A gives a mortgage to B. When A pays the debt secured by this mortgage to B in what manner is it shown by the record that the mortgage has been paid?

CHAPTER 28.

126. Name the parts of an ancient deed.

127. A makes out a deed to a nephew, B, but never delivers it to B and it is found in A's vault at A's death with his other important papers. Can B claim any rights under this deed? Why? If the instrument had been a will would your answer be any different?

128. What is acknowledgment? What is its purpose? Is a deed good without it?

129. Is recording necessary to the validity of a deed? What is the purpose of recording a deed?

CHAPTER 29.

130. Does the court permit a grantor to restrict the use of property by the grantee and subsequent purchasers?

131. What is the difference between a condition in a deed and a covenant in a deed? Which one does the court favor? Why?

132. A gave a deed to B containing the clause "This deed is upon the express condition that the premises shall not be used at any time hereafter for tavern purposes." The grantee used the premises for such purposes. A brings suit to recover the land. What would be your decision?

133. A laid out and founded a town and in all the deeds he put a covenant that the premises should not be used for saloon purposes. Assume that A owns a saloon in the town and his purpose is to secure a monopoly of a saloon business. Is the covenant enforceable? Assume again that his purpose is to discourage intemperance. Is the covenant enforceable in that case? A laid out a subdivision containing six blocks, each block containing ten lots and in each deed he put a restriction that no building should be

built within ten feet of the front lot line. B buys lot one, sells it to C who sells it to D who sells it to E. M buys lot two and sells it to N who sells it to O. In none of the deeds except the original deed is there any mention of the restriction. E now plans to build a flat building next to the block line. Has O any remedy and what is it?

134. Assume in the case above that upon various other lots there had been buildings erected across the lot line. Would this affect your answer? Why?

CHAPTER 30.

135. Define the terms testate, intestate, devise, legacy, bequest, administrator and executor.

CHAPTER 31.

136. What do we mean by canons of descent?

137. Where a man dies leaving children how would his property descend at common law? What was the rule of primogeniture?

138. State briefly what the present course of descent is? Where a man dies leaving children? Where he dies without children or descendants thereof.

CHAPTER 32.

139. What do we mean by saying inheritances descend per stirpes and not per capita?

140. Define the terms will, testament, codicil, nuncupative, holographic.

CHAPTER 33.

141. Can a minor make a will?

142. What mental capacity must one have to make a will?

143. A was a believer in spiritualism, was a constant attendant at seances and made a will leaving a bulk of his estate to a certain spiritualist for the purpose of extending spiritualism. A's heirs contest the will on the ground that he had an insane delusion. Will it stand?

144. A had a belief that he was persecuted by women in general and thought that there was a conspiracy among

all of his women acquaintances to destroy him. On other points he was perfectly rational. He died leaving a will in which he recited his belief that his daughter had been chosen as the agent of the others to kill him and he therefore disinherited her. There was absolutely no foundation to this belief. The daughter now sues to set aside the will. Will the will stand or fall?

145. What is incorporation by reference? What is essential thereto?

146. A made and signed a will and then brought it to B and C and said "this is my will and my signature" and they thereupon witnessed it. Was the will good?

147. A called B and C to witness his will. B took the will into the next room and witnessed it and then brought it back. A knew B's signature and made no objection. C signed in A's presence. Was the will good? Assume that the law requires two witnesses.

148. What is the attestation clause? Is it necessary?

CHAPTER 34.

149. What is a residuary clause?

150. What are the parts of the will?

CHAPTER 35.

151. State the extent of the right of a testator to revoke a will.

152. Name the ways in which a will may be revoked.

CHAPTER 36.

153. What is a probate court?

154. What are letters testamentary and letters of administration?

155. Name some things that the executor or administrator must file in the probate court.

CHAPTER 37.

156. What is the purpose of a contract in the sale of real estate?
157. What do we mean by merchantable title?
158. What is a range, a base line, a meridian?
159. Give a form of legal description of property.

CHAPTER 38.

160. What is, and what is the purpose of, an abstract of title?
161. What is a guaranty policy?
162. What is the office of an opinion of title?

CHAPTER 39.

163. What is the Torrens system of registering titles?
164. In what states has that system been adopted?

CHAPTER 40.

165. What remedies has a purchaser of real estate where the seller refuses to perform?

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